THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 20, No. 4 JULY—AUGUST, 1956

CONVEYANCER'S NOTEBOOK

MORTGAGOR'S POWERS OF LEASING

In *Lever Finance Ltd.* v. *Needleman's Trustees* [1956] 3 W.L.R. 72 (noted *post*, p. 322) a mortgage contained a clause prohibiting the mortgagors from exercising the powers of leasing except with the consent in writing of the mortgagees, but the clause went on to provide that a lessee should not be concerned to see that any such consent had been given. The mortgagors granted a lease without the consent of the mortgagees and the court held that the mortgagees were, as a result of the last-mentioned provision, estopped from alleging the invalidity of the lease as against themselves. A correspondent writes to say that as the clause would appear to be more or less common form, the decision calls for some alteration in practice.

But is the clause common form? Harman J. (at pp. 75 and 76) said that he had never seen it before and described the concluding provisions as "strange." So far as we are aware, there are two common form provisions, the first merely excluding the statutory power of leasing and the second taking the form of a covenant not to lease. Under the former the mortgagor can grant a lease without being in breach of covenant (*Iron Trades Employers Ince. Ass.* v. *Union Land and House Investors Ltd.* [1937] Ch. 313), while under the latter he is in breach. In neither case is a lease granted by the mortgagor binding on the mortgagee who is entitled to treat the lessee as a trespasser. No doubt there may be special circumstances where it can be shown that the mortgagee has adopted the lease, but this could hardly arise until he started to exercise his remedies, and mere delay in taking

steps to oust the lessee is not sufficient: see *Parker* v. *Braithwaite* [1952] 2 T.L.R. 731.

Questions and Answers on Wills

We were recently sent for review a small book entitled *Questions Answered on Making and Proving Wills* (Jordan & Sons Ltd.; price 3s. 6d.). There is some very queer law in it. Question 14 is "What is a *donatio mortis causa*?" The answer is: "It takes the form of a short deed of gift expressed to become effective if the donor should die as the result of a present illness or warlike venture, but to be cancelled should he recover or return safe . . . It is always wise to seek professional advice if such a gift is contemplated as no standard form of deed can possibly be given to meet the huge variety of possible circumstances. Also a solicitor makes a useful and convenient stakeholder in such cases . . . A *donatio mortis causa* is subject to legacy duty like any ordinary gift by Will." So far we have never been asked to draw a deed of gift by way of *donatio mortis causa* or been asked to become a stakeholder in respect of the subject-matter thereof. On domicile, we are told that one year's residence establishes it. On revocation, where it is by destruction, there must be the "avowed" intention of cancelling the will and, where a will is made in contemplation of marriage, it "must naturally become inoperative if the marriage never takes place." Examples of fraud, says the author, are rare, "unlike the case of ordinary deeds or documents presented for signature as if they were something quite different."

"A testator abroad should, of course, always communicate his intentions to the intended beneficiaries at home, and in these cases it is always wise to obtain advice from an English solicitor. [Who should obtain the advice, the testator or the beneficiaries?] The validity of a Will made by a foreigner in England is determined by English law." Some of the questions hold out fascinating hopes of unusual revelations, *e.g.*, "How can a potential beneficiary obtain sight of the will in which he is interested?" However, we had better desist from further quotations for fear of complaints of breach of copyright.

In case it might be supposed that the book is not written by a lawyer, we ought to add that the author is a member of the bar. In the same series are books on *Camping*, *How to Start a Farm* and *Woodwork*, which we have not seen. If the book we have been discussing may be taken as a fair sample of the series, we do not think any efforts of ours in the occupations

mentioned would be crowned with any marked success merely on the strength of a careful perusal of the books.

British Tax Review

A new quarterly, entitled *British Tax Review*, made its first appearance in June. Master Wheatcroft, the author of *The Taxation of Gifts and Settlements*, a work which deservedly achieved popularity among a circle by no means confined to lawyers, is the editor. Among the various contributors to the first issue are Messrs. G. H. Newsom, Q.C., D. C. Potter, K. F. Goodfellow, J. G. Monroe and D. R. Stanford, all of whom have graced the pages of *The Conveyancer*, so that we could hardly be rude about the *Review* even if we wished. Revenue law is not easy, but we cannot ignore it; it cannot be left to accountants or practitioners with wealthy clients. There is always the client who borrows £300 on mortgage and pays £5 a month with a sublime disregard of what part of the payments is repayment of principal and what interest, let alone whether tax on the interest has or has not been deducted; or the husband separated from his wife who has to pay maintenance for herself and the children and wonders whether anything can be done to ease the tax burden. In the sphere of rating some very nice points in regard to compounding allowances as they affect landlord and tenant and Schedule A tax can arise, while death duties, which represent the struggle between the optimists who think you can take it with you and the State which is determined to see you do not, are always with us.

While acknowledging the necessity of some knowledge of the subject, there is a feeling that most writing on tax law is so difficult and obscure as to be nearly incomprehensible to all except those already steeped in it. In considering the *Review* we gave particular attention to the question of clarity, and it appears to us to pass with honours under this head: the reader with no special knowledge of tax law can understand the articles. Although they are not confined to lawyer's law, our impression is that the editor has firmly in mind that his main audience is the ordinary practitioner, whether solicitor or accountant. We wish the *Review* every success and, if the standard of the opening issue is maintained, it will be a success. There may be one incidental result of great importance: if, as we think, for the first time substantial numbers of solicitors and accountants are reading the same journal the two professions are bound to come closer together, to their own mutual advantage and that of their clients.

"THE VALUE OF A SEARCH CERTIFICATE"

Mr. A. Bate writes to join issue with Mr. A. G. Robinson on two points in his article, "The Value of a Search Certificate," published *ante*, p. 229. Mr. Bate questions the accuracy of Mr. Robinson's example on pp. 231 and 232, where he says that a purchaser on exchange of contracts is protected under the Land Charges Act, 1925, s. 4 (2), by his official search within the previous fourteen days. Section 4 (2) protects a purchaser against entries made after his search and *before completion of the purchase* provided he *completes his purchase* within fourteen days. "Surely," says Mr. Bate, "this means that a purchaser is not protected merely by becoming purchaser (*i.e.*, exchanging contracts) but only if and when he completes his purchase within fourteen days? Surely the words 'completion of the purchase' appearing in both sections 13 and 4 (2) mean, and can only mean, that the purchase has been completed in the ordinary sense in which one speaks of 'completion of the purchase' in everyday conveyancing practice, *i.e.*, payment of the balance of the purchase money in exchange for the conveyance?" Mr. Bate argues that there is no need to give a person who has merely entered into a contract to purchase any protection, for he can insist on the charge being paid off before completion or he can rescind. If a purchaser wishes to protect his estate contract he must lodge a priority notice; although a search sometimes operates like a priority notice, it does not always do so.

Mr. Bate can find some support for his view as to the meaning of completion from *Lewis* v. *South Wales Ry.* (1852) 10 Hare 113, at p. 119, where it is described as "the complete conveyance of the estate and final settlement of the business," but this meaning can hardly fit the case of an equitable interest. Mr. Robinson agrees with Mr. Bate that it is certainly not apt to describe an exchange of contracts as the "completion" of a "purchase," but nor would one ordinarily so describe the acquisition of an equitable easement. For these reasons, Mr. Robinson doubts whether "completion" is to be construed more narrowly than "purchase." "It is conceivable," he says, "particularly in the case of associated companies, that a purchaser who intends to resell later on might pay his money and rely on a contract to convey to him or his nominee on demand—the object, of course, being to save stamp duty. In this case, irrespective of the merits of the construction, it seems to me undeniable that the purchaser 'completes' the purchase of an equitable interest in the sense of the Land Charges legislation, and the only significant differences from the ordinary

case are the intention not to acquire the legal estate in the near future and the payment of all the money. If it is said that it all turns on intention and payment of 100 per cent. instead of 10 per cent. of the money, I find it difficult to spell that out of the statutes." If Mr. Bate is right, what is the position of the purchaser who pays the whole of the purchase money but does not take a conveyance?

Mr. Bate's second point is on the position where there are two successive searches, the first being clear and the second revealing an entry. Mr. Robinson suggested (pp. 231–232) that a purchaser could rely on the first if completion took place within fourteen days. Mr. Bate takes the view that the purchaser would have little sympathy from the court. If he succeeded, it would be on a technicality without merits and the court would, he feels, look for some excuse to avoid this result: it might hold that "official search" means the last available search before completion. To ignore the later search certificate would to his mind be dangerous. Mr. Robinson's reply is that he qualified his views with the words "it seems" and he does not seek to put them any higher. The difficulty is that the land charges legislation has been construed strictly. It is unlikely in the extreme that a practitioner would deliberately ignore the later search certificate, but there are cases where it gets overlooked and he is acting innocently. For example, a search certificate dated Monday is received. Towards the end of the following week it seems clear that completion will be delayed and a second search is sent off. At the last moment completion takes place within the fourteen days and just before completion a search certificate has come in, which has not been seen by the practitioner or not looked at because he thinks he is safe in acting on the earlier certificate.

Stamp Duty on Conveyance or Lease of Land—Collateral Building Contract

The Board of Inland Revenue have issued the following statement of the liability to stamp duty on a conveyance or lease of land where there is a concurrent building contract whether with the vendor or lessor or a third party (*Law Society's Gazette*, June, 1956, p. 247):

> "The Board have taken legal advice concerning the stamp duty chargeable on conveyances or leases of building plots in cases where at the date of the contract for sale or lease no house has been erected or a house has been partly erected on the site which constitutes or is included in the subject-matter

of the sale or lease, and at the date of the conveyance or lease a house has been wholly or partly erected on the site.

"The Board are advised that the law is as follows:—

(i) Subject to what is said under (iv) below, if under the contract for the sale or lease the purchaser or lessee is entitled to a conveyance or lease of the land in consideration only of the purchase price or rent of the site, the *ad valorem* duty on the conveyance or lease will be determined only by the amount of the purchase price or rent, although it may have been agreed that a house is to be built on the site at the expense of the purchaser or lessee.

In such a case, the concurrent existence of a contract with the vendor or lessor or with a separate builder for the building of a house on the site will not increase the stamp duty chargeable on the conveyance or lease.

If under the contract the purchaser of the lessee is not entitled to a conveyance or lease until a house has been built on the site at his expense and if the house is to be built by the vendor or lessor or by his agent or nominee the payment of the building price by the purchaser or lessee will be part of the consideration for the conveyance or lease and will be liable to *ad valorem* duty accordingly.

(If the house is to be built by a separate builder, who is neither the agent nor the nominee of the vendor or lessor, the payment of the building price will not form part of the consideration for the sale or lease except in so far as the building price is for a house wholly or partly erected at the date of the contract for sale or lease.)

(iii) When the position is as in (ii) above, and a purchaser or lessee not entitled to a conveyance or lease until a house has been erected at his expense in fact obtains a conveyance or lease when the house has been only partly erected, *ad valorem* duty is payable on the conveyance or lease on the proportionate amount of the building price attributable to the partial erection of the house as computed at the date of the conveyance or lease.

(iv) In any event, if, at the date of the contract, a house has been wholly or partly erected, whether by the vendor or lessor or by his agent or nominee or by a separate builder, it necessarily forms part of the subject-matter of the sale or lease and the consideration or apportioned consideration for it is liable to *ad valorem* duty.

(v) The contract referred to above may be contained in more than one instrument or it may be partly written and

partly verbal. It includes any contractual arrangement between the parties.

"These observations explain, so far as is possible in general terms, the view of the law at present adopted by the Board, but they have not, of course, the force of law, and are promulgated merely with the object of assisting the taxpayer. The Board are not bound by them, and the circumstances of any particular case may call for special consideration."

This statement appears to accord with the law as stated in Monroe on *Stamp Duties* (2nd ed.), pp. 52 and 62. It will be noticed that the liability is determined in nearly every case by the state of affairs existing at the time of contract. If no part of the building has then been started the stamp duty is on the consideration for the land only unless the purchaser or lessee cannot call for completion until completion of the building; it is irrelevant that completion is in fact delayed until the building is wholly or partially completed. There appears to be one case missing, namely, where it is stipulated that completion is to take place when the first stage of the building is up. In this case it would seem to follow that duty is payable on the consideration for the land plus the first stage payment.

Costs. The Council of the Law Society have expressed the view that solicitors' costs will be calculated on the same basis as the stamp duty. In addition to the scale fee, costs under Schedule II will, no doubt, be payable in respect of the building contract.

Articles of Partnership

(Form 19, Volume 19, p. 707)

A subscriber has written expressing the view that the articles of partnership contained in the above-mentioned Form place the senior partner in an unduly favourable position compared with the junior partner. This would, of course, be a valid objection only if the draftsman were acting for the junior partner or for both partners, but, apart from this, the balance struck by the articles of any deed of partnership can only be truly determined in the light of all the surrounding circumstances of the case. To take one illustration applicable to the instant Form, the extent of the burden undertaken by the junior partner would vary considerably according to the age and expectation of life of the senior partner. The present Form should therefore be regarded as no more than a guide to the various matters which require to be considered and as an example of the detailed formulation of these

matters in relation to a particular set of (by no means necessarily typical) facts.

REDUCED CONVEYANCE DUTY

It is provided by the Finance Act, 1956, s. 37, that from August 1, when the amount or value of the consideration for the sale of property other than stock or marketable securities does not exceed £3,500 and the conveyance contains an appropriate certificate, the amount of duty shall be at the rate of 10s. per cent. When the amount or value of the consideration is between £3,500 and £4,250 the rate is £1 per cent. and when it is between £4,250 and £5,000 it is £1 10s. per cent.

The same rates apply to a premium on a lease, provided the rent, if any, does not exceed £20 a year.

Forms of certificates are published *post*, p. 751.

EXTENSION OF COMPULSORY REGISTRATION TO LEICESTER

By the Registration of Title (City of Leicester) Order, 1956, (S.I. 1956, No. 826), compulsory registration of title to land is extended to the county borough of the City of Leicester with effect from October 1, 1957.

NUISANCES UNDER THE PUBLIC HEALTH ACTS

By J. F. Garner, ll.m., Solicitor

One of the consequences of the social legislation of this century has been an increasing tendency by those in trouble to look for assistance to some governmental agency, central or local. The tenant in dispute with his landlord in some matter of repairs, the resident objecting to a neighbour who has spread fresh manure on his garden, allowed his chimney to smoke or is carrying on a wood-working business in his back garden, or the pedestrian on the highway who receives a douching of cold water from a defective gutter, all complain to the local authority and expect them to take some remedial action, rather than visit a solicitor and invoke the common law. Administrative action at the public expense is preferred to the expensive uncertainties of personal litigation.

The powers of the local authority (*a*) that may so be invoked are many and varied, but those of widest scope are the "nuisance clauses" of the Public Health Act, 1936, under which the authority, on a report of their officers or whenever they are satisfied that certain conditions exist, may take action to secure the abatement of a "statutory nuisance." It is therefore intended in this article to discuss the various matters that amount to a statutory nuisance, and the procedure by which such a nuisance may be abated.

(A) Statutory Nuisances

The following matters are declared to be statutory nuisances for the purposes of the Public Health Act, 1936 (*b*):

(i) "Any premises in such a state as to be prejudicial to health or a nuisance" (*c*).

This is the type of statutory nuisance most frequently to be met with in practice, but it should be noted that it refers to the state of the premises and not to the use made thereof (*d*); sewerage disposal works and public sewers are not "premises" within this

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(*a*) Here used in the sense of a local sanitary authority, *i.e.*, a borough or district council (outside London).

(*b*) Hereafter referred to as "the P.H.A., 1936."

(*c*) P.H.A., 1936, s. 92 (1) (a).

(*d*) *Metropolitan Asylum District Managers* v. *Hill* (1881) 6 App.Cas. 193.

provision (*e*), although the term is widely defined (*f*). Nuisance proceedings may be taken under these sections against another local authority (*g*), and also against the Crown (*h*). To some extent this paragraph overlaps other statutory provisions, but it does not appear that there is any reason why its provisions should not be used, just because some other provision might have been invoked.

(ii) "Any animal kept in such a place or manner as to be prejudicial to health or a nuisance" (*j*).

This paragraph may in some extent, and in some districts, overlap by-laws made by the local authority "for preventing the keeping of animals so as to be prejudicial to health" (*k*), but in practice the local authority will probably prefer the "nuisance" procedure to a prosecution under the by-laws, owing to the more efficacious procedure for abatement.

(iii) "Any accumulation or deposit which is prejudicial to health or a nuisance" (*l*).

There is a special defence available in a case brought under this paragraph where it can be established that the accumulation or deposit complained of is necessary for the effectual carrying on of a business or manufacture (*m*). In some circumstances, it may be considered more appropriate for the local planning authority to take enforcement action under sections 33 and 24 of the Town and Country Planning Act, 1947.

(iv) "Any dust or effluvia caused by any trade, business, manufacture or process and being prejudicial to the health of, or a nuisance to the inhabitants of the neighbourhood" (*n*).

There is a special defence to this paragraph also (*o*), where it

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(*e*) *R.* v. *Parlby* (1889) 22 Q.B.D. 520.

(*f*) P.H.A., 1936, s. 343 (1). For the purposes of the Water Act, 1945, "premises" was said to be a word involving some degree of permanency, and so a houseboat moored in a river was excluded from the term: *West Mersea U.D.C.* v. *Fraser* [1950] 2 K.B. 119; under the Celluloid and Cinematograph Film Act, 1922, a cave closed with a wooden door was held to be "premises": *Gardiner* v. *Sevenoaks R.D.C.* (1950) 114 J.P. 352. Both these decisions would, it is submitted, apply to the present context.

(*g*) *R.* v. *Epping Justices, ex p. Burlinson* [1948] 1 K.B. 79.

(*h*) Subject to the procedure of s. 341 of the P.H.A., 1936.

(*j*) P.H.A., 1936, s. 92 (1) (b).

(*k*) P.H.A., 1936, s. 81 (b). Neither of these provisions can be used in cases of noisy animals, such as crowing cocks or baying greyhounds, as the provisions deal only with sanitary matters: *Morrissey* v. *Galer* [1955] 1 W.L.R. 110, and see below.

(*l*) P.H.A., 1936, s. 92 (1) (c).

(*m*) *Ibid.*, s. 94 (4).

(*n*) P.H.A., 1936, s. 92 (1) (d).

(*o*) *Ibid.*, s. 94 (5).

can be established that the best practicable means (*p*) have been taken for preventing, or counteracting the effect of, the dust or effluvia. This paragraph is not used in cases of smoke nuisance (*q*), and it is not clear whether it can be used to deal with an obnoxious smell, where no dust or effluvia escapes.

(v) "Any workplace (*r*) which is not provided with sufficient means of ventilation, or in which sufficient ventilation is not maintained, or which is not kept clean or not kept free from noxious effluvia, or which is so overcrowded while work is carried on as to be prejudicial to the health of those employed therein" (*s*).

(vi) "Any well, tank, cistern or water-butt used for the supply of water for domestic purposes which is so placed, constructed or kept as to render the water therein liable to contamination prejudicial to health" (*t*).

This paragraph is not frequently used in practice, partly because the construction or use of wells, etc., in connection with new buildings in country districts is habitually and effectively controlled under the building by-laws made under ss. 61–70 of the Public Health Act, 1936.

(vii) "(a) Any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance;

"(b) Any part of a watercourse, not being a part ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up so as to obstruct or impede the proper flow of water and thereby to cause a nuisance, or give rise to conditions prejudicial to health" (*u*).

Liability under either of the headings of this paragraph can be attached only to the person by whose act or default the statutory nuisance arises or continues, and, if the proceedings taken are based on a default on the part of the defendant, it must also be shown that this was a default in executing some duty which was already imposed on the defendant by the general law or pursuant to some contractual obligation (*v*).

(*p*) This means that cost and "local conditions and circumstances" may be taken into account: P.H.A., 1936, s. 110 (2). What may be practicable in Mayfair may not be practicable in Bermondsey.

(*q*) See below.

(*r*) Defined in s. 343 (1) of the 1936 Act.

(*s*) P.H.A., 1936, s. 92 (1) (e).

(*t*) P.H.A., 1936, s. 141.

(*u*) *Ibid.*, s. 259 (1).

(*v*) *Neath R.D.C.* v. *Williams* [1951] 1 K.B. 115, following *Hodgson* v. *York Corporation* (1873) 37 J.P. 725.

(viii) "Any tent, van, shed or similar structure used for human habitation:—

(a) which is in such a state, or so overcrowded, as to be prejudicial to the health of the inmates; or

(b) the use of which, by reason of the absence of proper sanitary accommodation or otherwise, gives rise, whether on the site or on other land, to a nuisance or to conditions prejudicial to health" (*w*).

Apart from this provision, the legislature has been almost embarrassingly generous in the means of control provided over "tents, vans and sheds." By-laws may be made for promoting cleanliness in, and the habitable condition of, such structures (*x*), and, if a particular "movable form of shelter" has been in the same enclosure for a period of two years, it may be made the subject of a demolition or closure order or included in a clearance area, under the Housing Act, 1936, if it is unfit for human habitation (*y*). By way of a "longstop," the enforcement powers of sections 23, 21 or 26 of the Town and Country Planning Act, 1947, may be used where other statutory powers fail.

(ix) The shaft or outlet of an abandoned mine not provided with a properly maintained device so as to prevent any person from accidentally falling down the shaft or entering the outlet, provided it has been worked since 1872; if such a shaft or outlet is not provided with such a device and constitutes a danger to members of the public by reason of its accessibility from a highway or place of public resort, it is a statutory nuisance whenever the mine was last worked; a quarry that constitutes a danger to the public for a similar reason is also a statutory nuisance for the purposes of the 1936 Act (*z*).

(x) At the time of writing this article, colliery spoilbanks in certain circumstances may be a statutory nuisance, by virtue of the Public Health (Coal Mine Refuse) Act, 1939. When the Clean Air Act, 1956, is brought into operation, however, this provision will be repealed, and these spoilbanks will be dealt with under section 18 thereof, outside the statutory nuisance procedure. However, the Act will also amend (in effect) the "smoke nuisance" provisions of the Public Health Act (*a*), and, by virtue thereof, any smoke

(*w*) P.H.A., 1936, s. 268 (2).

(*x*) *Ibid.*, s. 268 (4).

(*y*) See Housing Act, 1936, s. 23, and, as to action to be taken under Part III thereof, s. 26 (8).

(*z*) Mines and Quarries Act, 1954, s. 151.

(*a*) At present contained in ss. 101–104 of the P.H.A., 1936.

other than smoke emitted from a chimney of a private dwelling or "dark smoke" (*b*) emitted from a chimney of a building or an industrial plant (*c*), which is a nuisance to the inhabitants of the neighbourhood, will be a statutory nuisance for the purposes of the Public Health Act, 1936.

(B) "Prejudicial to health or a nuisance"

This expression—or part of it—appears in the definition of many of the classes of statutory nuisance above described, and it is most important that its significance should be appreciated.

In the first place, it is clear that it is not necessary to establish the existence of *both* limbs of the expression in any particular instance—it is sufficient if it can be shown that the condition of the premises, etc., is *either* prejudicial to health *or* a nuisance (*d*). Secondly, it is important to apply the expression within the general context of the Act, a statute dealing with public health and sanitary conditions; the courts will not allow the "nuisance clauses" to be used so as to control matters not concerned with sanitation (*e*).

The meaning of "prejudicial to health" is reasonably clear; it is defined (*ee*) to mean "injurious or likely to cause injury to health," and would include conditions dangerous to life or limb. In practice, in a proper case, this is a comparatively simple matter for the local authority to establish, by the evidence of expert witnesses, such as their medical officer of health.

It is, however, much more difficult to say precisely, either in theory or in practice, what is meant by "nuisance" in this expression. It is sometimes argued that, by analogy with the definitions of nuisance in the ordinary cases on tort (*f*), it must here be used as being synonymous with discomfort or annoyance, but it is submitted that as no special definition is given to "nuisance" in the statute, it must be given the whole—and not just part—of its ordinary legal meaning (*g*). In order that liability

(*b*) This is a term of art used in the Act, and defined therein by reference to the use of the Ringelmann Chart, or some other test to be prescribed by Ministerial Regulations.

(*c*) The emission of dark smoke in these cases will be prohibited under other sections of the Act, subject to certain special defences.

(*d*) *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882) 10 Q.B.D. 138; *Betts* v. *Penge U.D.C.* [1942] 2 K.B. 154.

(*e*) Thus, these clauses cannot be used in the interest of preserving the amenities of the locality (*Pilling* v. *Abergele U.D.C.* [1950] 1 K.B. 636, a case on a similar point in s. 269 of the 1936 Act), or so as to control noisy animals (*Morrissey* v. *Galer* [1955] 1 W.L.R. 110).

(*ee*) By s. 343 (1) of the 1936 Act.

(*f*) Such as, for example, *Sturges* v. *Bridgman* (1879) 11 Ch.D. 852.

(*g*) "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their

may exist in the ordinary common law tort of nuisance, some injury must be occasioned to the use or occupation of the plaintiff's close or premises, Greenacre, by the use made of the defendant's neighbouring close or premises, Blackacre. The "nuisance clauses" of the statute cannot therefore, it is submitted, be invoked by a local authority against a landlord of a house because he has failed to keep it in proper repair, thereby causing the tenant some discomfort or "nuisance" (*h*), *unless* it can also be established that (i) the condition of the premises is "prejudicial to health," *or* (ii) its condition is such that it causes a nuisance, in the common law sense, to the occupier of some adjoining property, or to passers-by in the street (in which latter case, presumably, the existence of a common law public nuisance could be established). Probably "nuisance" as used in the statutory expression, can be read to include a mere common law private nuisance, but it might be argued that, being used in a public statute of this nature intended "to consolidate with amendments certain enactments relating to public health," Parliament must have intended "nuisance" to be confined to public nuisances. The present writer has not, however, been able to trace any reported case where a superior court has upheld proceedings on the nuisance clauses, based entirely on a private nuisance and in which there was no suggestion that the condition of the premises was prejudicial to health (*i*). In practice, such proceedings frequently come before the magistrates' courts.

(C) Abatement Procedure

Where the local authority are satisfied that a statutory nuisance, of any of the classes above described, exists, it is their duty to take the action prescribed in the statute to secure its abatement. They must first serve an "abatement notice" (*j*) on the person "by whose act, default or sufferance the nuisance arises or continues, or if that person cannot be found, on the owner (*k*) or occupier of the premises on which the nuisance arises." If, however,

technical meaning if they have acquired one . . .": Maxwell on the *Interpretation of Statutes*, 10th ed., at p. 3.

(*h*) See, *e.g.*, *Springett* v. *Harold* (1954) 118 J.P. 211, where it seems to have been taken for granted that statutory nuisance proceedings could not be brought in such circumstances.

(*i*) *Betts* v. *Penge U.D.C.* (*supra*) can be explained on the ground that the condition of the premises (where the landlord had removed the doors and windows of a dwelling-house, because his tenant failed to pay the rent) was in fact "prejudicial to health," and there was no question of a common law nuisance having to be established.

(*j*) This should be signed and served in accordance with the general principles of this Act; see article by the present writer at p. 104, *ante*.

(*k*) Defined in s. 343 (1) of the 1936 Act.

the nuisance arises from any defect of a structural character (*l*), the notice must be served on the owner, and if the person causing the nuisance cannot be found and the owner and occupier are clearly not at fault, no notice at all need be served and the local authority may forthwith step in and themselves abate the nuisance (*m*).

The abatement notice must specify the works to be executed or the steps to be taken to abate the nuisance, and a reasonable time should be given for compliance.

If the abatement notice is not duly complied with, or if the local authority consider the nuisance is likely to recur, it then becomes the duty (*n*) of the authority to prefer a complaint before a local magistrate; on the hearing of this complaint the magistrates may do any one or more of the following (*o*):

(i) make a nuisance order requiring the defendant to abate the nuisance (*p*) and/or execute works to prevent the recurrence thereof;

(ii) impose a fine not exceeding £5;

(iii) if the nuisance renders a building unfit for human habitation (*q*), prohibit the use of the building for that purpose until the court withdraws the prohibition;

(iv) order the defendant to pay to the local authority such reasonable sum as the court may determine in respect of the expenses incurred by the local authority in preferring the complaint and taking proceedings (*r*).

If the nuisance order is not complied with, further proceedings in the magistrates' court may be taken against the defaulter and he may be fined (*s*). Further, and this is of course the action normally taken, the local authority may themselves abate the nuisance, "and do whatever may be necessary in execution of the order" (*t*).

(*l*) This expression often causes difficulty in practice as the statute gives no guidance as to its interpretation. The liabilities of landlord and tenant as between themselves for repairs under the lease or tenancy agreement are not material when considering the liability of the parties under the statute.

(*m*) P.H.A., 1936, s. 93.

(*n*) The statute uses the word "shall," but it is a duty which is unenforceable in practice.

(*o*) P.H.A., 1936, s. 94.

(*p*) The magistrates must specify the works to be executed or the steps to be taken, but in so doing they need not specify the same matters as those specified in the abatement notice: *McGillivray* v. *Stephenson* [1950] 1 All E.R. 942.

(*q*) The special definition of this expression in s. 9 of the Housing Repairs and Rents Act, 1954, will *not* apply in this context.

(*r*) Such an order must be made if the nuisance still existed or was likely to recur at the time of the making of the complaint: s. 94 (3).

(*s*) P.H.A., 1936, s. 95 (1).

(*t*) *Ibid.*, s. 95 (2). They may use the power of entry on premises given by s. 287.

Where the local authority have so acted in default, they may subsequently recover their expenses reasonably incurred (*u*) from the person on whom the abatement order was made, and if that person was the owner of the premises, from any person who is for the time being the owner thereof (*v*). In the latter case, the expenses will become a charge on the premises, registerable in Part II of the local land charges register, and they will be recoverable summarily either as a single sum or by instalments if the authority make an "instalment order" (*w*).

(D) Conclusion

It has not been possible in this article to set out all the details of the procedure, the intention being merely to give the salient features. This "statutory nuisance" procedure is not as popular with some local authorities as the alternative of serving a notice, followed by a power to take default action forthwith (*x*), without any recourse to the courts until it becomes necessary to recover the authority's expenses from the person in default. The statutory nuisance procedure may certainly be slow in operation, but it has the merit that the courts must pass judgment on the validity of the local authority's action, before the authority have expended money from the rates in abating the nuisance on some private property.

The procedure has been adopted and extended in several local Acts obtained in recent years, particularly in clauses designed to secure the abatement of noise nuisances (*y*). It could also be argued that Parliament should be asked to extend the grounds of "statutory nuisance" so that the local authority would be entitled to intervene in any case where a complaint of a common law private nuisance was alleged. We would not go so far as this in these days of legal aid, but we would suggest that the special position of the local authority should be recognised in that they should be empowered to take proceedings in any case of *public* nuisance at common law regardless of whether any question of public health or sanitation was involved, and without having to establish any status as an "aggrieved person," and without any need to bring in the Attorney-General as relator.

(*u*) Together with an addition of 5 per cent. by way of establishment expenses: s. 292.

(*v*) P.H.A., 1936, s. 96 (1).

(*w*) Under s. 291, *ibid.*

(*x*) As, *e.g.*, under s. 39 of the P.H.A., 1936.

(*y*) See clause 80 in the Revised Edition 1953 of "Model Clauses," published by H.M.S.O.

NOTES ON PART II OF THE LANDLORD AND TENANT ACT, 1954

By Lionel A. Blundell, ll.m., and V. G. Wellings, m.a.(Oxon.), Barristers-at-Law

(*continued from page 103*)

II. The Determination of Tenancies to which Part II Applies

It is provided by section 24 (1) of the Act that a tenancy to which Part II of the Act applies will not come to an end unless terminated in accordance with the provisions of that Part of the Act. The landlord is empowered by section 25 to terminate the tenancy by a notice given in accordance with the requirements of that section; the tenant is empowered by section 26 to terminate the current tenancy by making a request for a new tenancy in accordance with the provisions of that section. The termination of the current tenancy under either of these sections entitles the tenant, provided he takes the appropriate steps for that purpose, to apply for a new tenancy under the Act. The current tenancy can also come to an end in certain other ways which will conclusively terminate the tenancy, leaving no right of application to the court for a new tenancy. By section 24 (2) the ordinary common law operation of a notice to quit given by the tenant is saved, as is also the operation of a surrender or forfeiture of the tenant's own tenancy or the forfeiture of a superior tenancy. In cases of forfeiture the tenant has his ordinary rights of relief from forfeiture; he is given no new rights by the Act and will lose all tenancy rights unless he can avoid the forfeiture under the ordinary law.

In the case of surrender it seems that a specifically enforceable contract to make a surrender is not invalidated by the Act. But a requirement as a condition of a grant of a tenancy that a tenant shall in advance give a notice to quit for a prescribed future date or agree to make a surrender on that date, both of which have been suggested as a means of avoiding the operation of the Act, appear to be nothing more in substance than elaborate methods of limiting the duration of a tenancy so as to expire on a particular date, and, having regard to the stringent provisions of section 38 against contracting out, it is doubted whether such devices would be held to be saved by section 24 (2). It is thought that

section 24 (2) is intended to apply to a notice given or agreement for surrender made after the tenancy has come into existence, not one imposed in advance as a condition of the grant of the tenancy and for the purpose of limiting its duration.

Another case where the current tenancy comes to an end without giving rise to any new tenancy rights is provided by section 28. Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, from a specified date, the current tenancy will continue to that date but no longer, and will not be a tenancy to which Part II of the Act applies. Once such an agreement is made for a new tenancy to commence from a future date the tenant cannot change his mind and claim in place thereof a new tenancy under the Act. It will be observed that the section is so worded that it will apply to an agreement for a new tenancy to commence during the subsistence of an existing contractual term and the latter will come to an end automatically on the date agreed for the commencement of the new term. The common law doctrine of surrender by operation of law upon the acceptance of a new lease was said to apply only to an actual demise and not to a mere agreement for a future lease (see *Woodfall*, 25th ed., § 2075), but since an agreement for a lease to start at a future date would in normal circumstances imply an agreement to surrender at that date any existing tenancy (*ibid.*), this particular application of section 28 does not seem to introduce any new principle of law.

The Nature of the Continuation Tenancy under Section 24

When the contractual tenancy comes to an end it is not essential that a "new tenancy" under the Act should immediately take its place. The new tenancy comes into existence either by an order of the court under section 29 or by an agreement under section 28 and its commencement may be postponed any number of years if neither party is in a hurry to establish a new basis of tenancy. In the meantime section 24 (1) provides for the old tenancy simply to carry on. This it does quite automatically without any notice or other action needed to be given or taken by either party. In this respect the statutory continuation under section 24 is like a statutory tenancy under the Rent Acts, but there the resemblance ends. Under the Rent Acts the statutory tenancy is not a tenancy at all; it is a mere personal privilege of exemption from eviction. It has been described as a status of irremovability and since it confers no estate or interest in the land, it is not strictly speaking a tenancy at all (*Keeves* v. *Dean* [1924] 1 K.B. 685). But section

24 of the Landlord and Tenant Act specifically says that until a certain event happens the tenancy is to continue. This can only mean that, notwithstanding that the period covered by the contract or grant has come to an end, the estate in the land vested in the tenant is to run on until it is brought to an end in one of the prescribed ways.

What has the tenant in the meantime? It is considered that he has an actual tenancy by statutory prolongation of the estate vested in him by contract. That being so, all the terms and conditions which by the terms of the contract govern the tenancy, save those relating to the termination of the contractual relationship, will continue to govern the continuation tenancy under the Act. And since the duration of the estate itself in the land is prolonged it follows that the tenant still has an interest which, subject to restrictions imposed by the terms of the tenancy, is assignable and, in the event of a breach of a condition of the tenancy, subject to forfeiture.

Not only is this statutory continuation of tenancy fundamentally different, therefore, from a statutory tenancy under the Rent Acts (so much so that it is conducive to misunderstanding and accordingly thought to be undesirable to describe it as a " business statutory tenancy "), but it also differs in a very important respect from the continuation of tenancy brought about by the Agricultural Holdings Act. There, under the Act of 1948, if a tenancy is granted for a fixed term of two years or upwards there is by statute an automatic continuation of tenancy thereafter from year to year, subject to the ordinary agricultural notice of twelve months. But then, whether the tenancy from year to year be one so arising under the statute or be a contractual yearly tenancy, the security of tenure afforded by the statute takes the form of rendering the notice to quit ineffective if certain steps are taken by the tenant or unless certain conditions are satisfied by the landlord. Thus under the Agricultural Holdings Act the protection of the tenant who has a contractual yearly tenancy is secured by placing restrictions upon the act of terminating the contract. The Landlord and Tenant Act does not say that a notice to quit shall be ineffective; what it says is that the tenancy shall nevertheless go on until one or other of certain conditions is satisfied.

Distinction between Terminating the Contract and Terminating the Tenancy

The Act draws a plain distinction between termination of the contract and termination of the tenancy, which can now by section

24 run on, notwithstanding the ending of the contract. The contract can come to an end by expiration of time or by notice to quit, by surrender, forfeiture and so on. A notice to quit is defined by section 69 as meaning "a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy." The use of the words "notice to terminate a tenancy" in this definition is unfortunate as it may lead to confusion with the statutory notice under section 25. A notice to quit, for the purposes of the Act, is one given in accordance with the provisions of the tenancy, not in accordance with the provisions of the Act. A notice to quit is given by the person who is the landlord at common law, and he is not necessarily the same as the person who is (*vide* the definition in section 44) the landlord for the purposes of the Act (see s. 44 (2)). There is nothing to be found in the Act which will interfere with the operation either of a notice to quit determining a periodic tenancy or a notice exercising a right to break a lease for a term of years at an intermediate point as an act terminating the contractual relationship between the parties. This is important; it means, for example, that a landlord desiring to exercise a right to determine a lease at the end of, say, the first seven years can do so by an ordinary common law notice complying with the requirements of the contract to that effect contained in the lease. Such notice will no longer terminate the tenancy (*vide* s. 24) but its service will give the landlord the right to serve a statutory notice of termination any time he wishes for a date not earlier than the date on which the contractual tenancy is now due to come to an end pursuant to the exercise by the landlord of his right to break.

In *Orman Bros.* v. *Greenbaum* [1955] 1 All E.R. 610 Lord Goddard C.J. spoke of the Act as having the effect that the landlord can only terminate a lease of property to which the Act applies by giving notice in the prescribed form. It is clear, however, that he was using "lease" as synonymous with "tenancy" and his mind was not there directed towards this distinction between termination of the contract and termination of the tenancy.

In *Castle Laundry* (*London*) v. *Read* [1955] 2 W.L.R. 943 the point directly arose and the judgment of Sellers J. makes the operation of the Act quite clear. There a lease for twenty-one years from December 25, 1947, provided for determination by either side at the expiration of the seventh or fourteenth years of the term on six months' notice in writing. On June 11, 1954, the landlord served on the tenants a valid notice under the lease to quit and deliver up possession on December 25, 1954. It will

be observed that during the currency of this notice the Landlord and Tenant Act was passed (July 30) and came into operation (October 1). The result was that although the contract was brought to an end on December 25, 1954, the tenancy continued because the notice was not (and in the circumstances could not have been) in the form prescribed under the Act (by regulations made on August 27, 1954): compare *Orman Bros.* v. *Greenbaum* [1954] 3 All E.R. 731 (Devlin J.; [1955] 1 All E.R. 610 (C.A.). The tenancy which continued under the Act after December 25, 1954 (in this case called a "business statutory tenancy"), was determined on July 22, 1955, by a notice in the proper form under section 25 of the Act served on January 19, 1955, and Devlin J. rejected the argument that since a statutory section 25 notice had not been given for December 25, 1954, the earliest date for which a notice to terminate could now be given was at the next break, *i.e.*, December 25, 1961.

The Date for which Notice to Terminate can be given

A notice to terminate under section 25 of the Act must specify a date of termination and the notice must be given not more than twelve (except where apart from the Act a notice longer than six months would have been required) nor less than six months before that date (s. 25 (2)). In the case of a tenancy which apart from the Act could have been brought to an end by notice to quit given by the landlord the date of termination must not be earlier than the earliest date for which such notice to quit could have been given on the date of the giving of the section 25 notice (s. 25 (3) (a)). In the case of any other tenancy the date of termination must not be earlier than the date on which apart from the Act the tenancy would have come to an end by effluxion of time (s. 25 (4)). Denning L.J. has summarised the effect of these provisions in *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714: "The object of section 25 (3) and (4) is to make it clear that the notice must not be given earlier than the common law time." The effect of giving a notice exercising a right to break a lease at a certain point of time is to make the lease expire by effluxion of time on that earlier date: see *per* Sellers J. in *Castle Laundry (London)* v. *Read*, at p. 947. If a section 25 notice is given for the break date or any later date without a common law notice having been given, then it must comply with section 25 (3) (a), that is to say, it must be given not later than the date on which a common law notice exercising the right to break the lease would have had to be served. But if a common law notice is served at the right time to terminate the contractual term on the date

provided by the break clause, a statutory section 25 notice can thereafter be served for any date not more than twelve nor less than six months ahead and not earlier than the accelerated date on which the tenancy is now due to expire by effluxion of time.

It is considered that the like position arises once a sufficient common law notice to quit has been served to terminate any periodic tenancy terminable by notice to quit. After service of such notice it would seem that section 24 (3) (a) no longer applies because that subsection is so worded as to deal with the case where a common law notice to quit has not previously been served ("the tenancy *could* have been brought to an end by notice to quit given by the landlord"); henceforth the only restraint other than that imposed by section 25 (2) as to the date for which Notice to Terminate can be given is that it must not anticipate the expiry date of the notice to quit. There is one exception to this. If the landlord gives a longer notice to quit than he needs to, serving it at a time when he could have given notice for an earlier date than the date he specifies, it would seem to be clear that he could, so long as he served it within the time it was open to him to give a notice to quit for the earlier date (see *Thompson* v. *McCullough* [1947] K.B. 447), give a section 25 notice for such earlier date.

In *Milletts* (*Victoria*) v. *Northley House*, so far only reported in the *Estates Gazette*, June 16, 1956, p. 605, the landlord had a contractual right to break the lease at any time on three months' notice upon obtaining certain building consents and licences for rebuilding. Having got those consents and licences the landlord served two notices on the same day, namely, August 25, 1955. One was a common law notice under the break clause, requiring possession in three months. The other was a statutory section 25 notice given for March 1, 1956. The lease would have come to an end by effluxion of time on March 25, 1956. It was argued that each of these notices was void, the first because it did not comply with the Act and the second because it contained no reference to the consents and licences having been obtained and purported to terminate the tenancy for an earlier date than that on which the lease would have come to an end by effluxion of time. It was also argued that since the notices were served at the same time and were inconsistent, each was accordingly void for uncertainty. Pilcher J. held that the section 25 notice in the statutory form was a perfectly good notice to terminate the tenancy under the Act. It was given for March 1, 1956, on a date when apart from the Act the tenancy could have been brought to an end on a date

earlier than that by notice to quit; it therefore complied with section 24 (3) (a).

There was some discussion in *Milletts'* case of the point that the section 25 notice, following strictly as it did the prescribed form, contained no reference to the conditions the satisfaction of which enabled the landlord to exercise his right to break at the time he served the notice. The judge held that the landlord could not be blamed for adhering scrupulously to the prescribed form and the notice was not on that account invalid. That case shows that it is perfectly in order to do what was there done by the landlord, namely, serve two notices, one exercising the common law right and the other terminating the tenancy under the statute. It seems that the statutory notice by itself would have been sufficient, and though there is nothing in the Act or Regulations to prevent an addendum being added to the Notice (on the document itself or in a covering letter) giving such information as shows that the landlord could apart from the Act have brought the tenancy to an end by notice to quit given for a date not earlier than the date of termination specified in the notice, and it may frequently be advisable to give such information, it does not appear to be strictly necessary.

Formalities as to Notices

Both a landlord's notice to terminate and a tenant's request for a new tenancy have to be in the "prescribed form," which forms will be found set out in the Landlord and Tenant (Notices) Regulations, 1954. The Regulations do allow some latitude, since they stipulate only that "The forms in the Appendix to these Regulations, or forms substantially to the like effect, shall be used," but substantial adherence to the form is clearly essential, and since the prescribed forms contain voluminous notes the use of a printed copy of the form is strongly recommended.

It is not proposed here to discuss the contents of these forms in detail, but to mention only two points which have already been before the court.

The first is that of signature. The case of *L. C. C.* v. *Farren*, *Estates Gazette*, May 5, 1956, p. 425; May 12, 1956, p. 449, involved some points peculiar to the case of signature by a county council officer; an appeal to the Court of Appeal is pending and the full report of the case which one may then expect will no doubt give more guidance than is at present available on the general subject of signatures to these statutory notices as well as on the special issues raised in that case. Attention has, however, been focused by this case on the point that the statutory form

seems to assume that the landlord is in every case an individual who will sign the notice personally. There is nothing in the Act itself, however, to rule out signature by an agent, and the practice which has been adopted up and down the country is for these notices to be signed by solicitors where solicitors have the conduct of the matter on the landlord's behalf. It is submitted that this is perfectly in order and that the addition of necessary words to show the agency of the person signing the notice on the landlord's behalf is the sort of thing intended by the Regulations when they speak of a form "substantially to the like effect."

The other point which it is proposed to mention here is that of contents of a Request for a New Tenancy under section 26. By the statute itself the Request must be in the prescribed form and must set out the tenant's proposals as to the property to be comprised in the tenancy, the rent and other terms (s. 26 (3)). The form follows these words precisely and requires the property to be comprised in the tenancy, the rent and other terms to be set out. One of the terms which must be set out is the duration of tenancy asked for: *Sidney Bolsom Investment Trust* v. *E. Karmios & Co.* [1956] 1 Q.B. 529. If, however, the request after stating the rent and any other special terms asked for specifies that the new tenancy shall in other respects be upon the terms of the current tenancy, this in the absence of an express mention of a specific duration by implication asks for a new tenancy of the same duration as the current tenancy (*ibid.*).

LICENCE TO REMAIN ON LAND (OTHER THAN A WIFE'S LICENCE)

By R. H. Maudsley, B.C.L., M.A., Barrister-at-Law

Professor Crane has recently discussed contemporary developments in the law relating to the right of a deserted wife to remain in the matrimonial home (*a*). The limitation of the discussion to that type of licence suggests that different considerations and rules may apply to different types of licences to enter land; and it may perhaps be of interest to note recent developments in other types. These are contractual licences and licences by estoppel. Contractual licences reached the zenith of their importance in 1948 (*b*) when the law concerning the relationship between the licensor and licensee was established. The question of the position of a contractual licensee *vis-à-vis* a third party is not likely to become a matter of so great importance. The licence which is likely to be of importance in regard to future developments is the licence by estoppel; that is to say, a situation in which a licensee is permitted, encouraged or induced to spend money on the land of the licensor or otherwise alter his position for the worse in pursuance of a representation by words or conduct made by the licensor. This is a situation which is of importance between the parties (*c*) and also between the licensee and third parties (*d*). The present discussion will be limited to the case of representations inducing the licensee to enter the licensor's land or to do something thereon; it is not proposed to discuss cases where a permission has been given to do something on the licensee's own land which may affect the enjoyment of the licensor's land (*e*).

Much of the discussion on the matter has been concerned with inquiring whether a new equitable interest in land has been created by the recent cases (*f*). It is not suggested that this is a new

(*a*) (1955) 19 *Conveyancer* 343.

(*b*) *Winter Garden Theatre Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173; [1947] 2 All E.R. 331.

(*c*) *Ramsden* v. *Dyson* (1865) L.R. 1 H.L. 129; *Plimmer* v. *Wellington Corporation* (1884) 9 App.Cas. 699; *Foster* v. *Robinson* [1951] 1 K.B. 149; [1950] 2 All E.R. 342.

(*d*) *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Errington* v. *Errington* [1952] 1 K.B. 290; [1952] 1 All E.R. 149; *Hopgood* v. *Brown* [1955] 1 W.L.R. 213; [1955] 1 All E.R. 550.

(*e*) *Winter* v. *Brockwell* (1807) 8 East 308; *Liggins* v. *Inge* (1831) 7 Bing. 682; *Duke of Devonshire* v. *Eglin* (1851) 14 Beav. 530.

(*f*) (1952) 68 L.Q.R. 337, 379; (1952) 16 *Conveyancer* 323; (1953) 16 M.L.R. 1. 215; (1953) 69 L.Q.R. 466; (1954) 17 M.L.R. 211; (1954) C.L.J. 201; (1955) C.L.J. 47.

equitable proprietary interest which can be bought and sold; at best it is one personal to the licensee. It is in that way less like an interest than other recognised equitable interests; even the benefit of a restrictive covenant can in an appropriate case be assigned (*g*). It is more like a mere equity than an equitable interest, as indeed Professor Crane has shown the deserted wife's licence to be (*h*). The question at issue is whether the licensee is entitled to protection in equity not only from interference by the licensor, but also from third parties. In order to discover whether a licensee is so protected it is well to consider on what grounds the licensee is protected against the licensor, and see whether such grounds are sufficient to protect him against third parties.

The case of deserted wives is governed by the exercise of a statutory discretion given by the Married Women's Property Act, 1882. The only way in which a husband may regain possession from his wife is by an order made by the court in the exercise of the very wide discretion which is given to it under section 17 of that Act to settle disputes affecting matrimonial property (*i*). The wife is thus protected against her husband, and she is protected also against his landlord (*k*). Her protection, under this discretionary power, is said to be based on an "irrevocable authority which the husband is presumed in law to have conferred on her" (*l*), a right analogous to her right to pledge her husband's credit for necessaries. The licence in such a case is the creation of the law and not of the parties; there may of course be a contractual arrangement between the parties which may co-exist with this licence which the husband is presumed to have given (*ll*). This protection is valid against some third parties (*m*) but it is not yet clear whether it is valid against bona fide purchasers with notice; what is clear is that the court's discretion may be exercised in favour of either party where the dispute is between such a purchaser and the wife (*n*). The purchaser then is in no worse position than the

(*g*) *Newton Abbot Corporation* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286; [1952] 1 All E.R. 279.

(*h*) (1955) 19 *Conveyancer* 343; *Westminster Bank* v. *Lee* [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

(*i*) *Bramwell* v. *Bramwell* [1942] 1 K.B. 370, 374; [1942] 1 All E.R. 137; *H.* v. *H.* (1947) 63 T.L.R. 645; *Stewart* v. *Stewart* [1948] 1 K.B. 507, 513; [1947] 2 All E.R. 813.

(*k*) *Old Gate Estates Ltd.* v. *Alexander* [1950] 1 K.B. 311; [1949] 2 All E.R. 822; *Middleton* v. *Baldock* [1950] 1 K.B. 657; [1950] 1 All E.R. 708.

(*l*) [1952] 2 Q.B. 477, *per* Denning L.J.

(*ll*) *Ferris* v. *Weaven* [1952] 2 All E.R. 233.

(*m*) *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307, 1311; *Lee* v. *Lee* [1952] 2 Q.B. 489; [1952] 2 All E.R. 1299; *Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

(*n*) *Woodcock* (*Jess B.*) *and Sons Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

husband. In cases which are not covered by statutory rules or procedure, the matter must be determined by the rules of common law and equity; and in contractual licences, it is to equity that the licensee must look for protection. The dicta of *Thompson* v. *Park* (*o*) are presumably perfectly good common law, but not, it is submitted, good equity. An answer to the problem of finding a means of protecting a licensee, left open in *Wood* v. *Leadbitter* (*p*), was attempted in *Hurst* v. *Picture Theatres* (*q*), but the reasoning in that case can hardly stand. The fallacy, generally agreed, is that a decree of specific performance ordering the defendant to execute a deed giving Hurst a licence would not have altered his position; a deed is only relevant if a conveyance of real property is the question at issue; and permission to look at the cinema is not real property. The only effect of a deed in a contractual situation is to make a gratuitous promise enforceable; consideration was given in this case, so the presence or absence of a deed was irrelevant. The proper sphere of operation of equity in this type of case was explained in *Winter Garden Theatre Ltd.* v. *Millennium Productions Ltd.* (*r*), where it was stated that if the contract were, on its proper construction, irrevocable, an injunction would issue to restrain revocation by the licensor. Any issue arising between the parties will therefore be decided as if no revocation had taken place (*s*). The contractual licensee is thus protected against his licensor by his right to an injunction to restrain revocation; the effect of the introduction of a third party into such a situation will be discussed below.

Licensees by estoppel may be protected at common law or in equity. Estoppel by record, estoppel by deed and estoppel *in pais* were early recognised by the common law. Estoppel by representation of fact or title was recognised in equity about the middle of the seventeenth century, and imported into the common law in Lord Mansfield's time (*t*). When such an estoppel exists, the licensee is protected without invoking the aid of equity; although the common law will permit a licensor to rely upon his own breach of contract to support his case, he cannot dispute in evidence facts which he is estopped from denying. Where, however, the licensee is asking for an equitable remedy—and he will often ask for an

(*o*) [1944] K.B. 408; [1944] 2 All E.R. 477. The decision was that an interim injunction would lie to restrain a forcible entry.
(*p*) (1843) 13 M. & W. 838.
(*q*) [1915] 1 K.B. 1.
(*r*) [1946] 1 All E.R. 678, 684; [1948] A.C. 173, 202.
(*s*) And it is therefore immaterial that the licensor may have taken action to eject the licensee before the latter has succeeded in his application for an injunction. *Cf.* 31 L.Q.R. 221.
(*t*) Holdsworth, *History of English Law*, Vol. IX, 144–163.

injunction—or where the estoppel is based on equitable grounds, his protection, like that of a contractual licensee, is limited to the availability of an injunction in equity. Where an estoppel is raised, the protection of the licensee against the licensor is undoubted; the more difficult question is the extent of its operation against third parties. Contractual licences and licences by estoppel will be dealt with in turn.

A. Contractual Licences

The fact that one party has a right to an injunction against another suggests that he has an equity of some sort. And indeed he has an equitable right against that other party. The question whether it is a right which will be enforceable also against third parties is one which cannot be answered by *a priori* reasoning. The great case of *Tulk* v. *Moxhay* (*u*) suggested that a right to an injunction against one party in respect of his property gives a right to an injunction against anyone coming to the property with notice of the right. And, while the basis of the enforcement of restrictive covenants affecting land has changed in modern times, restrictive covenants are equitable interests because they are held to place an equitable burden on the land, and they do so because the injunction will, in appropriate cases, lie against anyone coming to the land other than a purchaser of the legal estate for value without notice (*a*). Yet nothing could be clearer than the rule that a right to an injunction in respect of property against one party does *not* automatically exist against anyone coming to the property. In cases affecting land, the injunction lies in some cases and not in others (*b*); and in the case of chattels, the injunction usually does not lie against persons other than the parties to the contract (*c*); the question is, however, uncertain as regards some covenants affecting ships (*d*). The conclusion, therefore, is that there is no simple rule governing all cases of enforcement against third parties of covenants affecting property.

Licences without exclusive occupation

It therefore would appear to be necessary to consider, on grounds of general legal policy, the factors relating to the enforcement

(*u*) (1848) 2 Ph. 774.

(*a*) *Kelsey* v. *Dodd* (1881) 52 L.J.Ch. 34; *Mander* v. *Falcke* [1891] 2 Ch. 554; *Re Nisbett and Pott's Contract* [1905] 1 Ch. 391; *Re Simeon* [1937] Ch. 525; [1937] 3 All E.R. 149.

(*b*) *Formby* v. *Barker* [1903] 2 Ch. 539; *L.C.C.* v. *Allen* [1914] 3 K.B. 642.

(*c*) *Taddy & Co.* v. *Sterious & Co.* [1904] 1 Ch. 354; *McGruther* v. *Pitcher* [1904] 2 Ch. 306; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847.

(*d*) *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276; *Dominion Coal Co.* v. *Lord Strathcona S.S. Co.* [1926] A.C. 108; Hanbury, *Modern Equity* (6th ed.) 469.

against third parties of contractual licences. First, let it be noted that the theoretical basis of enforcement does not distinguish between cases of licences which do and those which do not give to the licensee exclusive possession. But whatever may be the position regarding the enforcement against third parties of licences giving exclusive possession, it seems clear on grounds of authority and policy that such protection will not be given in the case of licences which do not give exclusive possession. The well-known cases of *Clore* v. *Theatrical Properties Ltd.* (*e*) and *King* v. *David Allen Ltd.* (*f*) lay down that such protection is not given whether the licensee has entered or not; and they have been thought to be the stumbling blocks to the recognition of the protection of licensees against third parties in any type of licence (*g*). It has been found necessary to avoid their effect by arguing that *King* v. *David Allen Ltd.* (*h*) was a case of an executory and not an executed licence; this point was not, however, relied on by the House of Lords, and it is a distinction which has not been used since the days of *Taylor* v. *Waters* (*i*) and which was discarded in *Wood* v. *Leadbitter* (*supra*). And the *Clore* case (*k*) has been shelved, so far as academic and judicial conscience is concerned, by treating it as having been decided before the method, used in the *Winter Garden* case (*l*), of protecting the licensee in contractual licence cases, had been invented (*m*). These cases, however, need not be treated as obstacles in the path of the licensee's protection; they can be used to show that his protection, which is established according to the cases discussed below, is limited in accordance with sound policy. For, while it is consistent with principle, authority and policy to protect licensees in certain cases where they have exclusive possession of land, the protection of contractual licensees having something less than exclusive possession would cause far more problems than it would solve. For it would mean that every lodger would be entitled to remain in his room after a sale to anyone except a purchaser of the legal estate for value without notice; and this would have a serious effect on land sales. And the problem of deciding how in such circumstances a purchaser would get constructive notice would be prodigious. It is assumed that licences

(*e*) [1936] 3 All E.R. 483.
(*f*) [1916] 2 A.C. 54.
(*g*) By Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, 482–483; [1952] 1 All E.R. 1309, 1314; (1953) 16 M.L.R. 12, 13.
(*h*) *Supra.*
(*i*) (1817) 7 Taunt 374.
(*k*) *Supra.*
(*l*) [1948] A.C. 173.
(*m*) See note (*g*), *supra.*

are not registrable (*n*); even if they were, the matter would not be solved, for the enormous volume of work in registering every lodger's licence, to say nothing of persons staying for various periods in hotels, would increase out of all proportion the work of the Land Registry. Apart from registration, it is difficult to see how the purchaser would get notice; the rule in *Hunt* v. *Luck* (*o*), under which a purchaser is deemed, subject now of course to the provisions of the Land Charges Act, 1925, to have notice of the interest of any person in occupation of land, could not operate for the lodger is not in occupation; the purchaser would no doubt be shown round the premises when the lodger was away, but evidence of his existence may be visible. Admittedly, the lodger's licence is usually of short duration, but there is no guarantee of this, such as would satisfy a purchaser. It may of course be that the purchaser should be bound by a contractual licence giving something less than exclusive possession where he has actual notice of it, actual notice being proved by the licensee showing that he gave express notice to the purchaser. Such a rule would meet the problem concerning notice, but it still leaves the problem of the enormous number of incumbrances by which land could be burdened. It is submitted that it is best in such circumstances to accept the authorities on the point (*p*), and to leave the licensee to his remedy in damages against the licensor. Where, however, the licensee has been encouraged, in reliance on his right to protection against the licensor under his contract, to expend money on the land, an estoppel may arise in his favour; this is discussed below. It is submitted therefore that, apart from cases of estoppel, protection to contractual licensees against third parties is limited, if it exists at all, to cases of licensees having exclusive possession. The utterances of the courts however have been wide enough to cover both types of contractual licence (*q*).

Licensees with exclusive occupation

The question then is whether a contractual licensee with exclusive possession will be protected against persons other than his licensor. First, let it be noted that the situation is one which has not yet arisen and will rarely arise. *Errington* v. *Errington* (*r*),

(*n*) The only class of land charge which could, by definition, fit this case is class D (iii); it has, however, been held in *Lewisham Borough Council* v. *Maloney* [1948] 1 K.B. 50; [1947] 2 All E.R. 36, that the words "easement right or privilege" are to be construed *ejusdem generis*.

(*o*) [1902] 1 Ch. 428; *Barnhart* v. *Greenshields* (1853) 9 Moo.P.C. 18.

(*p*) *King* v. *David Allen Ltd.* [1916] A.C. 54; *Clore* v. *Theatrical Productions Ltd.* [1936] 3 All E.R. 483.

(*q*) *Bendall* v. *McWhirter* (*supra*); *Errington* v. *Errington* [1952] 1 K.B. 290; [1952] 1 All E.R. 149.

(*r*) [1952] 1 K.B. 290; [1952] 1 All E.R. 149.

the case usually referred to on this subject, is not, it is submitted, a case of a contractual licence, but of a licence by estoppel; and it is necessary to examine the facts closely. As is well known, the father of a young man who was getting married, bought a house through a building society; he paid the deposit and took the conveyance in his own name. He told the young couple that if they paid the instalments the house would be theirs. They went into possession and paid such instalments as were due up to the time of the litigation, but further instalments were to become due in the future. The father died, and devised the house to his wife. The son left his wife and returned to his mother's house; his mother sued her daughter-in-law for possession. The action failed on the ground that the defendant was a licensee who was entitled to protection not only against the licensor (the father-in-law) but also against his devisee. On what grounds was she entitled to protection against the licensor? The young couple were held not to be lessees, on grounds which are not here material. Were they contractual licensees? Can a contract be spelled out from the transaction? If it can, the terms must be that in consideration of something done or promised by the young couple, the father would convey the house to them. Such would have been the case if the couple had promised to pay the instalments. The contract would then be executory, a promise for a promise; but that was not the position, for the couple did not undertake to pay the instalments. If they had, this would be a case in the nature of a sale in which the consideration was the payment of the vendor's debt to a third person, instead of, as usual, the payment of money to the vendor. There would be then, as there would be in the case of any contract binding on the father, an estate contract, a contract by an estate owner to convey a legal estate (*s*). The young couple would have been well advised to register this, for, being unregistered, it would not have been binding on a purchaser from the father (*t*). It would however be binding on his widow and the decision is therefore consistent with the view that the licence was contractual. But it would not then be a case on licences, for the young couple, by virtue of the estate contract, would already be owners in equity of the house by virtue of the doctrine of *Walsh* v. *Lonsdale* (*u*).

If, as has been submitted, there was no contractual relation between the parties, what was the effect of the father's promise? It was, it is submitted, a unilateral contract, a promise for an act, and it is elementary contract law that the obligation in such

(*s*) Land Charges Act, 1925, s. 10.
(*t*) Land Charges Act, 1925, s. 13 (2).
(*u*) (1882) L.R. 21 Ch.D. 9.

a case only arises when the act is performed (*a*). It is a situation, in other words, like that of A promising B £10 if he will walk from London to York. B cannot claim the reward until he has arrived in York. Much judicial and academic energy has been directed to considering what the position is if A revokes his offer after B has set out (*b*); but that is not the point here; no one has ever suggested that B can collect the money without walking to York. It may be, in other words, that the father could not have revoked his promise to convey the land if the couple paid one or more of the instalments; but he cannot be contractually liable to convey at the date of the litigation because all the instalments had not then been paid. *Errington* v. *Errington* (*c*) is not therefore a case of a contractual licence. It will be submitted below that it is a case of a licence by estoppel.

In most cases, of course, in which one party goes into possession of land in consideration of a payment to the owner, he will be a tenant; but that is not invariably the case (*d*). The distinction between a licence and a lease is now said to depend, not on the enjoyment of exclusive possession, but to be a matter of the intention of the parties as objectively construed from the negotiations (*e*). Professor Hargreaves (*f*) has objected to this development. He has pointed out that such a change in definition is not necessary merely to give protection against ejectment to a party deserving such protection. It is not true to say, as Denning L.J. has suggested (*g*), that a person cannot at one and the same time be a tenant at will and be protected. A tenant at will has no protection at law; nor for that matter has a gratuitous licensee; but the latter can be protected in equity in appropriate cases; and so can the former. The present practice of holding

(*a*) Anson, *Law of Contract*, 20th ed., 24.

(*b*) Cheshire & Fifoot, *Law of Contract*, 3rd ed., 45; *Offord* v. *Davies* (1862) 12 C.B.(N.S.) 748; *Great Northern Railway* v. *Witham* (1873) L.R. 9 C.P. 16. It has been suggested that the offer is irrevocable because a contract is implied, when the offeree begins performance, that the offeror will not revoke. This is merely a way of forcing a typical estoppel situation into contractual terminology. But, even if this were the correct explanation of the offeror's inability to revoke, it does not make the licence contractual any more than a contract to keep open an option to sell is a sale.

(*c*) See note (*r*) *ante*, p. 286.

(*d*) *Marcroft Wagons* v. *Smith* [1951] 2 K.B. 496; [1951] 2 All E.R. 271; *Murray Bull & Co.* v. *Murray* [1953] 1 Q.B. 211; [1952] 2 All E.R. 1079.

(*e*) *Errington* v. *Errington* (*supra*); *Cobb* v. *Lane* [1952] 1 All E.R. 1199; *Marcroft Wagons* v. *Smith* (*supra*); *Murray Bull & Co.* v. *Murray* (*supra*).

(*f*) (1953) 69 L.Q.R. 466, 478–479; (1952) 16 *Conveyancer* 436 (Pollock).

(*g*) In *Errington* v. *Errington* [1952] 1 K.B. at p. 296, Denning L.J. said: "But in my opinion it is of the essence of a tenancy at will that it should be determinable by either party on demand, and it is quite clear that the relationship of these parties was not so determinable. The father could not eject the couple as long as they paid the instalments regularly to the building society. It was, therefore, not a tenancy at will."

certain persons who are in exclusive possession to be licensees and not tenants is of importance only in the opposite type of case, where the object is to help the landlord; the result of it is that in certain cases where the landlord, who would be unable to evict a tenant because of the tenant's statutory protection (by the Rent Acts (*h*) or the Limitation Acts (*i*)), is able to do so if the court can be persuaded that the party in occupation is not a tenant but only a licensee. It may or may not be beneficial to give the courts this discretionary power, by their freedom to construe the intention of parties one way or the other, to determine whether such statutory protection shall be available, but my point here is that such a development is not necessary in order to protect that occupier. If the defendant in *Murray Bull & Co.* v. *Murray* (*k*) had acted properly and reasonably and the landlord had tried to dispose of him by selling to a third party, one is tempted to think that he would have been held to be a tenant. But even if he were held to be a licensee, he could still try to bring himself within the rules discussed below relating to the protection of contractual licensees and licensees by estoppel who are in exclusive possession. It is submitted therefore that cases in which one party goes into exclusive possession in consideration of making periodical payments to the owners will be held to create tenancies unless the court, in order to deprive an undeserving tenant of the statutory protection, can do justice between the parties by construing the transaction, according to the intention of the parties, as a licence.

The contractual arrangement between the parties may of course be that the party going into possession may be entitled to do so for a period greater than three years; the lack of a deed in such a case makes it impossible for him to be a legal tenant for so long a period (*l*), and he will be held to be a tenant in equity, under the rule in *Walsh* v. *Lonsdale* (*m*), for such a period: the absence of writing to support the agreement is overcome by the doctrine of part performance which is satisfied by the going into possession (*n*). And the contractual arrangement may be on its proper construction a contract of sale, under which the party going into possession becomes immediately owner in equity. Such situations, which will cover many of those sometimes thought to be cases of contractual licences giving exclusive possession, do not

(*h*) *Marcroft Wagons* v. *Smith* (*supra*); *Murray Bull & Co.* v. *Murray* (*supra*).
(*i*) *Cobb* v. *Lane* [1952] 1 All E.R. 1199.
(*k*) See note (*d*), *ante*, p. 288.
(*l*) Law of Property Act, 1925, ss. 52, 54.
(*m*) See note (*u*), *ante*, p. 287.
(*n*) *Morphett* v. *Jones* (1818) 1 Swan 172; *Brough* v. *Nettleton* [1921] 2 Ch. 25.

involve problems of the law of licences; for these are all cases of grants at law or in equity.

It seems, however, that there are situations in which a party may be in possession of land under a contractual arrangement with the owner without his being the holder of a grant at law or in equity; and this situation gives rise to the question of his protection against his licensor and against the licensor's assignee. If, for instance, A, the owner of Blackacre, permitted B, in consideration of a promise by B to put the house thereon in repair, to live in it "so long as A did not want it for his own occupation," or "for the duration of the war" (*o*), and no doubt there are other types of case, B is not a tenant for a term; he is either a contractual licensee, or, if such a situation exists, tenant at will with the benefit of a contract not to be turned out for a certain period. It does not matter for our present purpose which he is; in either case he is protected on contractual grounds against his licensor and the question is whether he will be protected against third parties other than purchasers for value without notice. As stated above, there is no authority on this point; the dicta in *Errington* v. *Errington* (*p*) suggest that he would be protected against a volunteer. And it is important to note that the main arguments against permitting contractual licences giving something less than exclusive possession to be binding on third parties do not apply here. The rule in *Hunt* v. *Luck* (*q*) is appropriate in that a purchaser of the land will have constructive notice of the interest of the licensee by his possession; and situations of this type are sufficiently uncommon to make inapplicable the argument that land would be subjected to too many burdens if these rights were held binding on third parties. Indeed, in many cases of this type, the licensee will have acted to his detriment, in performance of his promises, and may be able to call in aid the doctrine of estoppel. It will be submitted below that where he can rely on estoppel, a third party, having notice of the licensee's occupation, will be bound. The question therefore is whether a distinction should be made between cases in which the licensee had acted substantially to his detriment and those in which he relied solely on his contractual rights. In the latter case, the licensee could be left to his remedy in damages against the licensor, or he

(*o*) *Lace* v. *Chantler* [1944] K.B. 368; [1944] 1 All E.R. 305. If rent were paid B would of course become a tenant for a period corresponding to that by which the rent was due. See also Validation of Wartime Leases Act, 1944: (1950) 66 L.Q.R. 337.

(*p*) See note (*r*), *ante*, p. 286.

(*q*) See note (*o*), *ante*, p. 286.

can be given an injunction against the third party. Logical argument can be produced for either course; in the absence of authority, with the support of the dicta in *Errington* v. *Errington* (*r*), and in the absence of good reason to the contrary, it is submitted that the contractual rights given to the licensee in such a case, if it should arise, ought to be enforceable against third parties other than purchasers for value without notice. These, however, are rare cases, and contractual licences are not the ones which are going to figure most prominently in this field.

B. Licences by Estoppel

Apart from deserted wives the most important type of licence to a discussion of the protection of licensees against third parties is what is here termed a licence by estoppel. The factual situation in general terms is that the owner of the land has permitted or encouraged another person to do something at the latter's expense on the former's land; the question is whether the owner can then turn out the licensee. A simple case would be that A, the owner of Blackacre, by a representation that the land was B's, or by a gratuitous permission, encouraged B, the owner of adjoining land, to build a garage on Blackacre at B's expense. When the garage is complete, A, intending to use it himself, orders B off the land. B would be protected; and *Errington* v. *Errington* (*s*) is a perfect case of this type. A, the owner of land subject to a mortgage, permits B to occupy it and promises that, when B has paid off the mortgage debt, A will convey the land to B. Can A wait until B has only £1 still to pay, and then turn B out? Clearly the court would interfere to restrain A, and this interference would be on the ground of estoppel. In considering the application of this rule it will be seen that it is concerned both with cases between the two original parties, and also with cases between the licensee and assignees of the licensor.

The question then is when this estoppel arises (*t*). It may be helpful, before discussing this question, to make certain general observations which are of importance to this type of case. First, no estoppel arises where a party, knowing that he has a limited interest in land, and without being led by the freeholder to believe that that interest is, or will be made, greater, nevertheless expends money on the land. The common case here is where a leaseholder or tenant at will expends money on improvements which last beyond

(*r*) *Supra* note (*r*). *Canadian Pacific Railway* v. *The King* [1931] A.C. 414; *Greenshields* v. *Smallburgh U.D.C.* [1955] C.L.Y. 2848.
(*s*) See note (*r*), *ante*, p. 286.
(*t*) Spencer Bower, *Estoppel by Representation*, pp. 9–11.

his tenancy. A landlord incurs no liability by permitting a tenant to spend money in such a way as to benefit the reversion (*u*). Secondly, an estoppel will not usually arise where the landowner permits the other party to act in a particular way to his detriment when that party is anticipating the successful outcome of negotiations in which they are engaged. Thus, if the owner of land is negotiating for its sale to a prospective purchaser, and this prospective purchaser is permitted to go into possession and to expend money, knowing the position concerning the negotiations, he may well be taken to have done so at his own risk (*a*). Nevertheless, a court would no doubt refuse to permit the vendor to mislead him and then to break off the negotiations. Thirdly, the reasons which give rise to the estoppel may not be permanent. Thus, if a landowner leads an occupier to believe that he may stay in a house rent free for the rest of his life, the protection to which he or his family is entitled ends with his death (*b*). If permission is given to A to build a garage on B's land and to use it for a period of time, A's protection will end when that period ends. And even if no estoppel prevents the licensor from revoking, the licensee in occupation is of course entitled to proper notice and to a reasonable length of time in which to arrange his departure (*c*). Fourthly, in cases in which the licensee is relying for his protection upon estoppel, the distinction between persons in possession of the land and those not in possession arises, from a practical point of view, in just the same way as it does in contractual licences. Where the so-called licensee is in possession of land and is protected from the owner under the doctrine of estoppel, a purchaser of the land will have notice of the licensee's interest under the rule in *Hunt* v. *Luck* (*d*). But the problem really arises where he has something less than possession. It has been submitted that no protection should be given against third parties to contractual licensees who are not in possession of the land, and that, on grounds both of authority and of practical necessity, such a licensee should be left to his remedy on the contract against the licensor. Cases in which the licensee relies for protection against the licensor on the doctrine of estoppel are different because the licensee here has no other remedy than injunction (*e*); and if the land has been assigned, the licensee must have

(*u*) *Dann* v. *Spurrier* (1802) 7 Ves. 231; *Pilling* v. *Armitage* (1806) 12 Ves. 78, 85: *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129.

(*a*) *East India Co.* v. *Vincent* (1741) 2 Atk. 83; *Laird* v. *Birkenhead Ry.* (1859) John. 500: *Canadian Pacific Railway* v. *The King* [1931] A.C. 414.

(*b*) *Foster* v. *Robinson* [1951] 1 K.B. 149; [1950] 2 All E.R. 342.

(*c*) *Canadian Pacific Railway* v. *The King* (*supra*); *Minister of Health* v. *Belotti* [1944] K.B. 298; [1944] 1 All E.R. 238.

(*d*) See note (*o*), *ante*, p. 286.

(*e*) Not being in possession, he cannot bring trespass.

this remedy against the assignee or against no one at all. If the licensee is to be protected on this ground against the assignee, there must be some way of distinguishing purchasers for value without notice, who will not be affected by the licensee's protection in equity, from others. This is easy in the case of persons in exclusive occupation by the application of the rule in *Hunt* v. *Luck* (*f*), but in other cases it is more difficult. And it is thought that the problem of affecting purchasers with constructive notice of matters giving rise to an estoppel other than those which give exclusive occupation is, again, insuperable. Nevertheless, the question is whether something should not be done to protect a licensee where a third party came to the land with actual notice of the circumstances giving rise to the claim to protection on grounds of estoppel; for, as pointed out above, that is the licensee's only remedy. The question has not, so far as is known, arisen; a suggestion will, however, be made after discussing the cases in which exclusive possession of land has been given.

Conditions for operation of estoppel

Before dealing, however, with the cases of persons protected in their occupation of land by the doctrine of estoppel it is necessary to say something about the circumstances in which the doctrine is called into operation. It is not the main object of this paper to make an exhaustive examination of this question, a difficult task indeed, but rather to consider the position of a licensee against a third party where the doctrine applies between him and his licensor. Nevertheless, a few words must be said. The application of the doctrine has been explained on many occasions at the highest level in varying degrees of generality (*g*). The essence of them all, however, is that a party will be estopped from proceeding contrary to a representation which he has made and which has encouraged the other party to act to his detriment, usually by the laying out of money. The representation is often a representation of title; where A encourages B to believe that the land, which belongs to A, is B's, and B spends money on it, A cannot later claim the land from B (*h*). Similarly, where the representation is one of fact. This jurisdiction is undoubted; the only question, which is a difficult one in almost every case, is whether it applies to the particular

(*f*) See note (*o*), *ante*, p. 286.

(*g*) *Per* Lord Eldon in *Dann* v. *Spurrier* (*supra*), at pp. 235–236; *per* Lord Cottenham in *Williams* v. *Jersey* (1841) Cr. & Ph. 91, 96; *per* Lord Romilly M.R. in *Beaufort* v. *Patrick* (1853) 17 Beav. 74, 75; *per* Lords Cranworth and Kingsdown in *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, at pp. 140, 170; *per* Fry L.J. in *Willmott* v. *Barber* (1890) 15 Ch.D. 96, 105; Spencer Bower, *op. cit.*, pp. 9–11.

(*h*) *Ramsden* v. *Dyson* (*supra*); *Hopgood* v. *Brown* [1955] 1 W.L.R. 213; [1955] 1 All E.R. 550.

facts in question. The jurisdiction becomes more controversial where the representation is one of intention, and is in effect a promise. It has been said that estoppel can only operate where there is a representation of fact, or where a contract, express or implied, exists between the parties (*i*); and in *Canadian Pacific Railway* v. *The King* (*k*) the hypothetical case just discussed is analysed as justifying the inference of a contract by A not to disturb B in the possession of the land, or as a statement by A that the land is B's, upon the faith of which B has acted and built. Nowhere is it laid down when such a contract will be inferred; such a contract is clearly not one implied from the conduct of the parties, for it is clear from the circumstances that the licensor (A in this case) did not in fact enter into any such contract. The contract then is one entirely constructed or inferred in law; the licensor is to be bound because he will not be permitted to act otherwise; the terms are those imposed by the court, and the consideration is presumably the detriment suffered by the licensee. It is interesting to speculate whether a court would permit such a theory to render itself powerless if the technical requirements of contract law could, for one reason or another, not be fulfilled. Thus, if A were an infant, could he tell B that the land was his (B's) and encourage B to build a house thereon, and then turn B out (*l*)? Could a company turn B out if the representation were *ultra vires* (*m*)? Such situations might lead a court to reconsider whether the ground on which the licensor is restrained is really one of contract. Whatever would be the court's reaction to these points, there is modern authority for the view that where, in the course of dealings between parties, one makes a gratuitous statement of intention, intending that the other shall act upon it and the other does act upon it to his detriment, the first party may not subsequently take action inconsistently with his declared intention. This of course is the doctrine of the *High Trees* case (*n*), which, in

(*i*) By Lord Russell of Killowen in *Canadian Pacific Railway* v. *The King* (*supra*), at p. 429: "The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying." *Lala Beni Ram* v. *Kundun Lall* (1899) L.R. 26 I.A. 58, 64. Roxburgh J. in *Greenshields* v. *Smallburgh U.D.C.* (*supra*) took the same view.

(*k*) [1931] A.C. 414.

(*l*) *Mills* v. *Fox* (1887) 37 Ch.D. 153.

(*m*) *Cf. Sinclair* v. *Brougham* [1914] A.C. 398, 415.

(*n*) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227; [1948] 2 All E.R. 767; *Tool Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657; *Lyle-Mellor* v. *A. Lewis & Co. (Westminster) Ltd.* [1956] 1 W.L.R. 29; [1956] 1 All E.R. 247; (1951) 67 L.Q.R. 330; (1952) 15 M.L.R. 1.

order to avoid conflict with the rule in *Jorden* v. *Money* (*o*), has been called quasi-estoppel (*p*). The future of this doctrine is not fully established, and I do not propose to discuss its validity. Let two points be noted; first, that it has been applied in licence cases (*q*); and, secondly, that, unless the circumstances are such as to make the inference of a contract impossible, it is immaterial, in litigation between licensee and licensor, whether the licensee is protected on grounds of quasi-estoppel or on the ground of an inferred contract. It only becomes material where, as in the present analysis, it is suggested that different considerations concerning protection against third parties may apply according to the ground on which protection against the licensor is based. If the correct analysis of these cases is that the ground of protection is contractual, then the position of the so-called licensee will often be that of a person holding under a grant at law or in equity. Thus if, in *Plimmer* v. *Mayor of Wellington* (*r*), there had been a contract between two parties to grant the land to Plimmer, the position of the respondents would have been unarguable; for Plimmer would have become owner in equity of an equitable interest in the land by virtue of the contract. If the rule in the *High Trees* case is accepted, this class of case is better treated, it is submitted, as an application of that rule rather than as a contractual licence; and for the present purpose it will be so treated.

The licensees and third parties

Assuming, then, that the licensee is protected against the licensor on grounds of estoppel, the next question is the extent to which such protection avails also against a third party. And, as in the cases involving deserted wives, the question has arisen in connection with a third party who was not a purchaser, and also with one who was. *Errington* v. *Errington* (*s*) has already been discussed at length. The daughter-in-law was there held to be protected against the devisee of her licensor. Her protection depended upon a right to an injunction to restrain interference, and this injunction was available, as has been submitted, on grounds of estoppel. No question, *pace* Dr. Cheshire (*t*), of specific performance arose, because, according to the terms of the only arrangement which she could possibly claim to enforce, she

(*o*) (1854) 5 H.L.Cas. 185.
(*p*) (1951) 67 L.Q.R. 330.
(*q*) *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Foster* v. *Robinson* (*supra*); *Errington* v. *Errington* (*supra*).
(*r*) (1884) 9 App.Cas. 699.
(*s*) See note (*r*), *ante*, p. 286.
(*t*) (1953) 16 M.L.R. 12.

was not entitled to claim the land until all the instalments had been paid; and when that situation had arisen, the duty to convey would have become contractual. Therefore, on those facts there could never be a right to specific performance based on estoppel.

Two cases deal with the position of a purchaser from the licensor. In the well-known case of the *Duke of Beaufort* v. *Patrick* (*u*) a statute authorised the building, subject to compensation, of a canal through the land owned, *inter alios*, by one Popkin, and leased by him to Morris. Arrangements were made for compensation to be paid to the lessee, but no arrangements were made for compensation for the freeholder, Popkin; he knew, however, that the canal was to be built and approved the plans. In 1794, before building began, a foreclosure order was made in respect of Popkin's land, and the particulars of sale contained a statement to the effect that the canal was to be built and that it would make the land very valuable. In 1800, by which time the building was complete, one Calland, having full knowledge of the situation, became the purchaser. After Calland's death, his devisees brought an action of ejectment against the Duke of Beaufort, who was in possession of the canal. Sir John Romilly M.R. held that the Duke was entitled to protection in equity against the plaintiffs, just as he would have been against Popkin; and that compensation should be arranged. So far as the devisees of Calland were concerned, Romilly M.R. said (*a*): "In this state of circumstances, I am of opinion that the purchasers are not bound by the acts of Popkin, except so far as it appears by the facts above detailed, that their testator had a knowledge of those acts. But the defendants are clearly bound by everything that bound their testator, John Calland; and I think that, upon these facts, John Calland could not, after his purchase, have contended with success, that he was entitled to resume the land occupied by the canal, after the expiration of the term of sixty-five years." It will be noted that Calland was said to be bound by such facts relating to the canal as he actually knew; he was clearly affected by the estoppel, and his devisees could be in no better position. The estoppel here was raised by Popkin's implied undertaking not to interfere, and that estoppel was held binding on a purchaser with notice and on volunteers.

The next case involves the position of a purchaser who did not have actual notice, and is concerned with a representation of title. In *Hopgood* v. *Brown* (*b*), two adjoining plots of land (here

(*u*) (1835) 17 Beav. 60.
(*a*) At p. 78.
(*b*) [1955] 1 W.L.R. 213; [1955] 1 All E.R. 550.

called plots A and B) were conveyed to a purchaser in 1932 by separate conveyances. The common boundary was not precisely indicated, reference being made in each conveyance to a plan "for the purpose of facilitating identification only." Both plots were later sold, B to the defendant, and A, to the north of it, to a company of which the defendant was a director. The defendant engaged the company to build a bungalow and a garage on his plot, which, with the consent of the company, encroached on plot A beyond the line which would form the boundary between these plots if the boundary between them were a line drawn parallel to their other lateral boundaries. When the garage had been built, it gave the appearance of forming the boundary; but, if the boundary were such a parallel line, it covered also a wedge-shaped area belonging to plot A. Plot A was sold to one Lister in April, 1952, and by him to the plaintiff in November, 1952, and these conveyances described the plot in the same terms as the conveyance of 1932 had done. The plaintiff began to build a bungalow on plot A, and after the building had reached an advanced stage he discovered that it was not possible for a car to pass between his bungalow and the southern boundary of his plot because of the encroachment made by the defendant's garage. There was also a question concerning the drainage of the two premises which is not of importance here. The plaintiff sought to terminate the encroachment and to have the garage removed. The Court of Appeal held that the garage was an encroachment, but it was one about which the company, having permitted the defendant to build, could not complain; and that the plaintiff was in no better position. Sir Raymond Evershed M.R. said (*c*): "Is it really suggested (for this must, I think, follow from an argument to the contrary) that the company, having assented to what had been proposed, having participated in what followed, and having taken the sum of £2,200 from the defendant for building the garage and his house in the places which he had identified, could tell the defendant next day that they had now measured the plot more accurately, and that he must take down that part of the garage which encroached upon the company's land, and which they had just built at his entire expense? It seems to me that such a suggestion would, indeed, shock common sense and be contrary to the realities of the case.

"If that is right, the only other question is whether the disability on the company's part from averring the boundary to be in any place other than where they, with the defendant, had put it, is equally binding on the plaintiff. In my judgment, that

(*c*) At p. 224. See also Morris L.J., at pp. 230–231.

can also be answered in favour of the defendant; . . ." His Lordship then quoted a dictum of Lord Mansfield in *Taylor* v. *Needham* (*d*), in which the doctrine of estoppel is said to operate to prevent a person who takes an estate by deed from taking a greater right than his transferor had. *Taylor* v. *Needham* (*e*) was a case in which it was held that the assignee of a lessee was no more able to dispute the landlord's title than the lessee would have been. This is a case of an estoppel by deed; it is a situation in which the question of the binding effect of the estoppel on the purchaser of a legal estate for value without notice does not arise; and this type of estoppel is one which has its origin in the common law. *Hopgood* v. *Brown* (*f*), on the other hand, is a case of estoppel by an oral or implied representation of title; this type of estoppel, as stated above, has its origin in equity and is later imported into the common law (*g*). Great injustice could be done to purchasers of land if an estoppel of this type were held binding on them in all circumstances; and although the estoppel is binding at common law, it is submitted that it should not be enforced against purchasers of a legal estate for value without notice, actual or constructive. The purchasers in *Hopgood* v. *Brown* (*h*) did have constructive notice, under the rule in *Hunt* v. *Luck* (*i*), by the existence of the garage. The importance of *Hopgood* v. *Brown* (*k*) is that it shows that a representation of title, under which the representee acts to his detriment as a licensee, is binding on a purchaser with constructive notice of the representation; and it is difficult to see why, if a representation of intention under the *High Trees* doctrine has the same effect between the parties, it would not have the same effect against third parties. There does not yet appear to be a case in which a representation of intention, giving rise to an estoppel in equity only, has been held to be effective against a purchaser with constructive notice. Nevertheless, if such a representation does give rise to an estoppel in equity, it appears that it would be so held; that, in other words, enforceability against purchasers with constructive notice is not limited to cases of estoppel recognised by common law (*l*); nor is the enforcement against third parties of an equitable estoppel limited to volunteers or to cases of purchasers with actual notice (*m*).

(*d*) (1810) 2 Taunt. 278.
(*e*) *Ibid.*
(*f*) See note (*b*), *ante*, p. 296.
(*g*) See note (*t*), *ante*, p. 283.
(*h*) See note (*b*), *ante*, p. 296.
(*i*) See note (*o*), *ante*, p. 286.
(*k*) See note (*b*), *ante*, p. 296.
(*l*) *Hopgood* v. *Brown* (*supra*).
(*m*) *Duke of Beaufort* v. *Patrick* (*supra*).

In these cases the licensee was protected against interference from a third party by virtue of an estoppel operating in his favour. He may in certain circumstances go further. He may compel the licensor to convey to him land which he has occupied, or a right which he has enjoyed over land; and may also do so against the personal representatives or devisee of the licensor. No case is known in which this right has been held to be exercisable against a purchaser with notice, but it is thought that there is no reason why it should not be so exercisable. If the right to the conveyance is based on contract, then an estate contract is in existence, and the rights of the contracting parties are valid against all persons other than purchasers for value without notice, and the licence to enter the land is immaterial; we are concerned here solely with rights based on estoppel. In *Dillwyn* v. *Llewellyn* (*n*) the testator, by his will, left all his estate in Glamorgan and Carmarthen to trustees upon certain trusts. During the testator's lifetime he expressed a wish that his second son, the plaintiff should live with him, and offered to the plaintiff a farm called Hendrefoilan, so that the plaintiff might build a house on the land. A memorandum purporting to present the property to the plaintiff was signed by the testator and his eldest son. The plaintiff thereupon spent £14,000 on the house with the knowledge and approbation of the testator. The Lord Chancellor, Lord Westbury, held that the plaintiff was entitled to call for a conveyance of the fee simple. He said (*o*): "About the rules of the court, there can be no controversy. A voluntary agreement will not be completed or assisted by a court of equity, in cases of mere gift. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A gives a house to B, but makes no formal conveyance, and the house is afterwards, on the marriage of B, included, with the knowledge of A, in the marriage settlement of B, A would be bound to complete the title of the parties claiming under that settlement. So if A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it' and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal

(*n*) (1862) 4 De G.F. & J. 517; *Laird* v. *Birkenhead Ry.* (1859) John. 500; *Bannister* v. *Bannister* [1948] 2 All E.R. 133.
(*o*) At p. 521.

agreement not binding originally for the want of a memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance . . . "

No attempt is here made to distinguish the circumstances in which the licensee will be entitled, on grounds of estoppel, to protection by injunction from those in which he is entitled to a conveyance. The two types of remedy may be available in similar circumstances, according to the plaintiff's requirements. Nevertheless it is difficult to explain, on principle, why a decree should be available to a volunteer who is armed solely with facts giving rise to an estoppel. The issue of a decree need not be justified here, for, as a general rule, an injunction is more readily issued than a decree of specific performance, and an injunction would be available, if the plaintiff desired it, in any case in which he successfully obtained a decree. And all the licensee requires for his protection is an injunction.

Licensees not in possession

The final question is whether a licensee, having less than possession of the land, who is protected against his licensor on grounds of estoppel, will be protected also against third parties. The matter has already been mentioned (*p*). It has not yet arisen, so far as is known, in litigation. The difficulties involved in making such a licence binding on persons who have constructive notice are great, for there is no way, the rule in *Hunt* v. *Luck* (*q*) being inappropriate, in which it could be shown whether the purchaser had constructive notice or not. The position here is just the same as it was with contractual licences giving less than exclusive possession. But it is important to do all that is possible to protect the licensee, for, in the absence of contract, he has no remedy against the licensor once the land has been assigned. It is therefore suggested that purchasers with actual notice of the circumstances giving rise to the estoppel and all volunteers should be bound by it. The purchaser would be under no duty to inquire, and the risk would be on the licensee to make sure that the purchaser knew. Such a rule would not impose unreasonable burdens upon the land, for the occasions on which these circumstances arise appear to be rare.

(*p*) *Supra*, p. 293. A situation in which this question would arise is one in which A gratuitously gave B permission to use A's tennis court every Sunday afternoon for a year; he permitted and encouraged B to spend money on repairs and improvements to it; and then claimed to revoke the permission before the year was complete.

(*q*) See note (*o*), *ante*, p. 286.

Summary

In conclusion, it is therefore submitted that the problem of the protection of the deserted wife is, as Professor Crane has shown, largely worked out; and that other licensees will be protected against assignees of their licensor according to the following rules:

i. Contractual licensees who—
   (a) do not have exclusive possession by virtue of the contract will not be protected whether the assignee has notice or not; they will be left to their action on the contract against the licensor;
   (b) have exclusive possession will usually be entitled to protection by virtue of some grant at law or in equity; in the absence of such a grant they will be protected against every person coming to the land except a purchaser for value without notice, actual or constructive, the rule in *Hunt* v. *Luck* (*r*) being applied.

ii. Licensees protected under the doctrine of estoppel who—
   (a) do not have exclusive possession will be protected against purchasers with actual notice and against volunteers;
   (b) have exclusive possession will be protected against every person coming to the land except a purchaser for value without notice, actual or constructive, the rule in *Hunt* v. *Luck* (*s*) being applied (*t*).

(*r*) *Ibid.*
(*s*) *Ibid.*
(*t*) I am grateful for the assistance which Mr. J. W. Davies of Brasenose College has given to me in the preparation of this paper.

REGISTERED LAND—RECTIFICATION AND INDEMNITY

Some Further Orders of the Chief Land Registrar

By Theodore B. F. Ruoff, Solicitor

Two years ago the Chief Land Registrar was kind enough to make available to me some interesting, important and previously undisclosed facts about claims against the Land Registry insurance fund (*a*). With his permission I am now able to report the circumstances in which six subsequent orders for the payment of indemnity have been made. Of these, three claims were based upon a loss attributable to a rectification of the register and three upon a loss arising because the register could not by law be rectified.

Omission of Restrictive Covenants

The first of these claims concerned the erroneous omission of restrictive covenants from the title of an applicant for first registration. In 1953 A purchased for £550 a vacant plot of freehold land which was conveyed to him subject to the restrictive covenants imposed by a conveyance dated in 1913. These covenants were expressed to benefit and be enforceable by the owner or owners for the time being of any land forming part of the large and important estate which included A's plot and there was a proviso limiting liability to the period of ownership. The stipulations that the covenantor covenanted to observe included one to the effect that "no building shall at any time be erected on any part of the hereditaments hereby assured except private dwelling-houses only and every dwelling-house built upon the said hereditaments . . . shall be a detached house standing in a separate plot of not less than one acre. . . ." In his conveyance A covenanted with his vendor by way of indemnity to observe and perform these covenants and, following completion of his purchase, A applied to H.M. Land Registry for first registration of his title with an absolute title. This was granted, but owing to a mistake made by the examiner of title in the registry no entry was made in the charges register of A's title of the covenants in the 1913 conveyance.

(*a*) See 18 Conv.(N.S.) 130 *et seq.*

It is provided that the effect of registration of any person as first proprietor of a freehold estate with an absolute title is to vest the fee simple in him "subject to the incumbrances and other entries, if any, appearing on the register [and subject also to other interests not here material] . . . but free from all other estates and interests whatsoever . . ." (*b*). It is apparent, therefore, that immediately after the completion of first registration the registered title was not subject to the covenants in the 1913 conveyance although A (whose solicitors cannot have checked his land certificate on receiving it from the registry) could not be heard to say that he himself purchased without notice of the covenants or that he himself was not bound by them so far as they were intrinsically enforceable (*c*).

Then in 1955 Mr. and Mrs. B purchased A's plot of land together with other land. The proportion of the purchase price attributable to the covenant-free plot can, by simple arithmetic, be fairly put at £500. Mr. and Mrs. B applied to the local planning authority and obtained, subject to conditions, outline planning permission (*d*) to enable them to erect one dwelling-house on part of the plot having an area of rather less than half an acre. Thereafter they put the land into the hands of estate agents for sale and eventually C agreed to buy it for £1,100. By the time the draft contract had been submitted to C's solicitors, Mr. and Mrs. B received a letter from the local residents' association, a limited company, which claimed at that date to be entitled to enforce the estate covenants, although this did not conclusively appear. They drew the attention of Mr. and Mrs. B to the restrictive covenants in the 1913 conveyance and, in particular, warned them that the building of the proposed house would infringe the stipulation that required each house to stand in at least one acre of its own land. The solicitors acting for Mr. and Mrs. B attempted to negotiate with the residents' association with a view to the imposition of some modified covenants which would at once satisfy them and allow the sale to C to be proceeded with but the association remained adamant and averred that they could and would take steps to ensure the enforcement of the covenant that required an acre of land for each building. This led Mr. and Mrs. B's solicitors to approach the Chief Land

(*b*) Land Registration Act, 1925, s. 5.

(*c*) See the Law of Property Act, 1925, s. 199 (1) (ii); *Re Cox and Neve's Contract* [1891] 2 Ch. 109; *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391; [1906] 1 Ch. 386.

(*d*) Under the Town and Country Planning Act, 1947, Part III; Town and Country Planning General Development Order, 1950, art. 5 (2).

Registrar, and they pointed out that since their clients had purchased the land on the assumption that it was free from all restrictive covenants, they were faced with the probability of imminent and serious loss which was directly attributable to the registry's failure to disclose the covenants on the register.

The Land Registration Act gives the Chief Land Registrar powers of rectification (subject to a right of appeal to the High Court) " where, by reason of any error or omission in the register, . . . it may be deemed just to rectify the register " (*e*). It is also provided (*f*) that " the register shall not be rectified . . . so as to affect the title of the proprietor who is in possession . . . unless . . . in any particular case, it is considered that it would be unjust not to rectify the register against him." The complementary provisions about the payment of indemnity out of the Land Registry insurance fund are also germane. On the one hand, " any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified " (*g*). On the other hand, " where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission, shall, subject to the provisions of this Act, be entitled to be indemnified " (*h*).

It is thus apparent that it was open to the Chief Land Registrar to do one of two things, provided he was convinced of the justice of taking either course. He could leave the register unrectified or he could rectify it by entering on it notice of the restrictive covenants contained in the 1913 conveyance. If he refrained from rectification the persons entitled to the benefit of the restrictive covenants would, presumably, seek to enforce them through the court. If, owing to the conclusiveness of the register being upheld by the court, the plaintiffs failed to obtain an injunction or damages, they would be entitled to be indemnified for any actual loss they could prove they had suffered, but it seems that their losses might be at one and the same time both nebulous and continuing. But the court, like the Chief Land Registrar, could, of course, order the register to be rectified by the insertion of the omitted covenants. Mr. and Mrs. B would then be entitled to be indemnified in respect of any resulting loss to them. This course would, without doubt, lead to a much speedier, happier and cheaper settlement of the difficulties arising from the omission of the covenants from the register.

In these circumstances the Chief Land Registrar deemed it both

(*e*) Land Registration Act, 1925, s. 82 (1) (h).
(*f*) *Ibid.*, s. 82 (3).
(*g*) *Ibid.*, s. 83 (1).
(*h*) *Ibid.*, s. 83 (2).

expedient and just to rectify the register and in doing so he reminded the solicitors acting for Mr. and Mrs. B of the possibility of their clients having a claim for indemnity, although he pointed out that the price they had paid for ostensibly unincumbered land was substantially the same price as that which A, who bought with full knowledge of the covenants, had paid. Meanwhile C abandoned his proposal to purchase the land.

In regard to the amount of indemnity payable after rectification it is clear that the value immediately before rectification is material. The Act states: "Where an indemnity is paid in respect of the loss of an estate or interest in or charge on the land the amount so paid shall not exceed . . . where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification" (*k*). The estate of Mr. and Mrs. B had not, of course, been lost, but impaired, and the principle set out above should be applied as far as possible. In addition, in granting any indemnity the Chief Land Registrar may add to the amount payable any costs and expenses properly incurred by the applicant (*l*).

In due course a claim was submitted to the Chief Land Registrar on behalf of Mr. and Mrs. B which was based upon a licensed valuer's estimate of the difference in value of the land free from all restrictive covenants and its value subject to the covenants in the 1913 conveyance but before this could be adequately considered, Mr. and Mrs. B found another purchaser, D. They then put in a modified claim, as follows:—

	£	s.	d.
Price payable under abortive sale to C.	1,100	0	0
Deduct price payable by D.	1,000	0	0
	100	0	0
Add solicitor's charges	27	0	0
Add surveyor's fees	18	18	0
	£145	18	0

After due consideration this claim was met in full.

Error in Amount of Rent

A small claim arose from a clerical error made in the register relating to the title to a lease for 99 years which was registered with

(*k*) *Ibid.*, s. 83 (6).

(*l*) *Ibid.*, s. 83 (8).

good leasehold title. The rent reserved by the lease was £6 15s. but following a transfer to AB the rent was incorrectly entered in the proprietorship register as being £6 only. AB transferred to CD and later a disagreement arose between CD and his lessor as to the amount of the rent payable. In due course the Chief Land Registrar was told of the matter and the register was rectified to show the correct rent (*m*). CD then claimed that when buying the lease he had relied on the statement in the register as correctly expressing the rent and that he had suffered and would continue to suffer loss by reason of the rectification (*n*). He calculated his loss at the rate of twenty times the difference between the true rent and the rent as erroneously stated on the register, that is, a total of £15. In one sense it is difficult to see how CD could seriously maintain that he had been misled by the register because presumably his solicitors, and in all likelihood he himself also, must have read the original lease which was and remained at all times an indispensable part of the title to the leasehold term despite registration (*o*). However, his claim was paid without quibble. It will be appreciated that the mistake would not have arisen at all if the title had not been registered.

Squatter's Title based on Statutory Declaration

In the course of a year the Land Registry receives a great many applications founded upon, or partly founded upon, evidence by statutory declaration as to long possession. It is scarcely necessary to warn the readers of this learned journal of the dangers —aside from deliberate perjury—inherent in the vague and merely formal phrases which all too often constitute a large part of these kinds of declarations. For example, the statement so commonly used that "I and my predecessors in title have been in full free and undisputed possession of the said land for fifty years" scarcely tells the reader anything more than he already knows or suspects and it does nothing to establish the declarant's title simply because all of us have a predecessor in title. Again, an attempt is often made to buttress a weak title with the declaration of a third party (such as a neighbour, or the local parson, or even a charwoman) who cannot ordinarily know whether the occupier's occupation of land is that of a freeholder, a long leaseholder, a short term tenant, a licensee, an invitee, or a trespasser. It might possibly be otherwise if the declarant gained his knowledge through being

(*m*) Under the Land Registration Act, 1925, s. 82 (1) (h).
(*n*) See *ibid.*, s. 83 (1).
(*o*) *Cf.* Land Registration Rules, 1925, r. 5 (1).

the solicitor, the accountant, the personal representative, or an unusually close confidant of the occupier.

The Chief Land Registrar is empowered by law to confer the blessing of an absolute title in respect of holdings of land which, although they are open to objection, are unlikely, in his opinion, to be disturbed (*p*) and it is clear from his annual reports to the Lord Chancellor that he does everything in his power to grant the best kind of title whenever possible. As a result, it is not perhaps surprising that under the policy of a liberal insurance of title, flaws that are hidden at the time of first registration sometimes appear later on. Be that as it may, the examiners of title in the Land Registry have on three occasions been deceived as to a title alleged to have been acquired by a squatter. In the first of these cases the claim of an applicant to a narrow plot of freehold land was supported by rather vague statutory declarations. The evidence adduced consisted of:—

1945. An estate agent's declaration as to 15 years' occupation by A.
1945. Conveyance on sale: A to B.
1945. Conveyance on sale of 6 plots: B to C.
1948. Conveyance on sale of 5½ plots: C to D.
1953. A declaration by D that he had been in possession since 1948 and that he had made a claim for loss of development value.

Weak though this evidence was, the willingness of the three successive purchasers to buy the land was significant and an absolute title was granted to D. In 1954 D sold the 5½ plots to E and later in the same year E sold 1½ plots to F. Of this area one small plot having a road frontage of about 20 feet was to form the subject of a dispute. After completing his purchase F began to build a house on this plot and the adjoining land and he raised money by means of a mortgage to a building society. Shortly afterwards one L wrote the Chief Land Registrar claiming the land which had been registered in F's name. He adduced in support of his title a conveyance of 1891 to his vendor of the land in dispute and a further conveyance dated in 1944 to himself. His documentary title was unimpeachable but whether or not he had forfeited his rights in favour of an adverse possessor was far from clear. He had not, for example, made any claim for loss of development value and he had certainly not physically occupied his land. On the other hand he said that the statutory declarations of A's estate agent and of D (which were produced to his solicitor

(*p*) Land Registration Act, 1925, s. 13, proviso (c).

for inspection) were vague and did not establish any act that could be construed as adverse possession. In short, he alleged that when F began to build that action constituted the first overt act adverse to his own title.

It was abundantly clear that whatever steps the Chief Land Registrar decided to take, it would not, in view of the registration of two purchasers for value and one mortgagee, be proper or just for him to rectify the register against F. In this connection it is provided as follows:

> "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession—
>
> (a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or
>
> (b) unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void; or
>
> (c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him" (*q*).

As to paragraph (a), obviously F, as an innocent purchaser for value of land registered with an absolute title, had not caused or contributed to any mistake, even assuming that a mistake had occurred.

As to paragraph (b), the transfer in F's favour and the transfer to his vendor were not void because, whatever the position may have been on first registration, both D and E had an inherent power to transmit a good title to a purchaser for value free from pre-existing defects (*r*).

As to paragraph (c), L had been guilty of laches and it was by no means an impossibility that his right to sue for recovery of the land had become barred. He had taken no steps in the past to prevent the Limitation Act from running against him. Certainly justice required that F should not be ousted from possession.

Being denied the remedy of rectification, L sought the payment of indemnity as a person who had suffered loss through an error

(*q*) Land Registration Act, 1925, s. 82 (3).

(*r*) See the Land Registration Act, 1925, s. 20 (1); *Morrelle Limited* v. *Wakeling* [1955] 2 W.L.R. 672, at p. 690. This part of the judgment of the Court of Appeal was not disturbed by the decision in the House of Lords in *Att.-Gen.* v. *Parsons* [1956] 2 W.L.R. 153.

which was not corrected (*s*). He claimed £250 for deprivation of his land and costs. This was considered excessive because he had paid only £75 for it in 1944 and standing alone it was not wide enough to take a building. In all the circumstances he was perhaps fortunate in being paid out of the Land Registry insurance fund £140 for his claim and £25 for his solicitors' costs.

Squatter's Title—Another Case

In another squatting case the Chief Land Registrar registered an applicant with absolute title on first registration but a critical scrutiny of the ascertainable facts at a later date disclosed that neither the applicant nor her predecessors had been continuously (*t*) in possession adverse to the title of the true owner, nor indeed was her possession entirely exclusive. The land was vacant and this is the kind of situation which often arises when an owner leaves his property unlet and unused and visits it only occasionally and then, as luck would have it, in the temporary absence of the squatter who, in the present instance, turned out to be a gipsy. After first registration, and before the true nature of her squatting was uncovered, the first registered proprietor sold the land to an innocent purchaser for value who erected three buildings. It was not until then that the previous owner who, of course, held the title deeds and could deduce a sound paper title, discovered what had occurred. He immediately sought compensation from the Land Registry insurance fund (*u*).

He did not seek to recover his land and that is noteworthy because persons who are ignorant of the facts sometimes allege that the insurance provisions of the Land Registration Acts work an injustice. It was even said by one somewhat disingenuous but anonymous writer about the Haigh case (in which a registered proprietor's signature was forged after he himself had been dissolved in a bath of acid) that the fact that an innocent purchaser from the forger was allowed to keep the land whilst the murdered man's personal representatives had to be content with compensation for loss of it, meant that they suffered a disadvantageous loss of property. But of course this writer can scarcely have known (as was the fact) that the personal representatives did not want the land back. In the result, the innocent purchaser and the personal representatives were both satisfied, whereas had the title been an unregistered one, there could not have been a felicitous end to the story for both of them.

(*s*) Under the Land Registration Act, 1925, s. 83 (2).
(*t*) *Cf. Trustees, etc. Agency* v. *Short* (1888) 13 App.Cas. 793.
(*u*) Under the Land Registration Act, 1925, s. 83 (2).

But to return to the present squatting case; the owner of the unregistered paper title made a claim as follows:—

	£	s.	d.
Loss of land (according to a licensed valuer's valuation) excluding, of course, the value of the buildings put up by the registered proprietor	420		
"Dispossession damages" (based upon his intention to build a house for himself on retirement)	100		
Valuer's fee	5	5	0
Solicitor's costs	30	8	0

As to the so-called "dispossession damages," the Land Registration Act provides for compensation for actual loss at the time of the error which causes it (*a*) but not for remoter or other damage. That part of the claim could not therefore be met. But the claimant was paid the rest of his claim.

Bona Fide Purchaser after Fraudulent Registration

Another recent claim arose in unusual circumstances out of a fraudulent claim to a title by adverse possession which, by misleading the examiner of title in H.M. Land Registry, caused him to make an error in the register. In 1939 a Mrs. G. was registered as proprietor of a freehold house in pursuance of an assent. Fifteen years later, in 1954, a Mr. K. applied for registration, claiming to have acquired a title under the Limitation Act, 1939 (*b*), and supporting his claim with two statutory declarations as to his alleged exclusive adverse possession over a period of thirteen years. It is provided in such a case that "the Registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, . . . qualified, or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts . . ." (*c*). Although a rectification of the register (that is, the closing of the existing registered title) is involved, the entry of the applicant's name is an act of first registration (*d*). The applicant K had made out a prima facie case and the Chief Land

(*a*) Land Registration Act, 1925, ss. 83 (2), 83 (6) (a).
(*b*) Limitation Act, 1939, ss. 4 (3), 16; Land Registration Act, 1925, s. 75 (2).
(*c*) Land Registration Act, 1925, s. 75 (3).
(*d*) *Ibid.*

Registrar, in the course of satisfying himself as to K's title, served a notice by registered post upon Mrs. G., the existing proprietor, at the address given in the register, which was her address for service (*e*). This was returned through the Dead Letter Office (*f*) so that it then appeared, either that Mrs. G. had been negligent in failing to keep her registered address up to date, or, more probably, that she had disappeared and was no longer interested in the property. In due course K was registered with absolute title in her place.

Shortly thereafter, K. sold to Mrs. S. for £750 and a number of other dispositions for valuable consideration were registered. It is significant, although not strictly pertinent, that whilst conducting the hearing of a dispute soon after the sale to Mrs. S., the Chief Land Registrar suspected that a document before him, being a charge, had been forged by K. It was in K.'s favour and it had not been executed by the chargor. Be that as it may, it was not long before Mrs. G. turned up and produced evidence which suggested with overwhelming force that K. had committed perjury (*g*). The matter was reported to the Director of Public Prosecutions but for reasons which need not be here mentioned he was disinclined to prosecute K. either for forgery or for perjury.

Meanwhile Mrs. G. sought rectification of the register in her favour and she proved that although her registered property had long been vacant, she had not yielded physical control of it for it had been in the management of a firm of estate agents from the year 1940 onwards. They held the keys and on several occasions they entered the property for the purpose of inspection and effecting minor repairs. The local borough treasurer confirmed that there had been no occupier from 1940 until 1953 and there was similar supporting evidence from the local water board and others. The evidence, in short, demonstrated that Mrs. G. had not lost title by adverse possession although, of course, she had lost it by rectification of the register. Clearly, in view of the provisions already quoted (*h*) and by virtue of the several dispositions for value which had taken place, it would be neither just nor permissible to rectify the register against the present registered proprietor who was in possession. Indeed, Mrs. G.'s neglect in failing to notify the Land Registry of her change of address was a considerable factor in the rectification that had

(*e*) See the Land Registration Act, 1925, s. 79; Land Registration Rules, 1925, r. 315.
(*f*) Land Registration Act, 1925, s. 79 (3).
(*g*) See the Perjury Act, 1911, s. 5.
(*h*) Land Registration Act, 1925, s. 82 (3).

been made against her. Had she kept the register up to date, K.'s fraud could not possibly have been successfully concluded. However, she had an alternative claim for indemnity as being a person suffering loss where the register is not rectified (*i*), in which she sought to recover the value of the estate of which she had been deprived. It is interesting to note that in such circumstances the value must be ascertained as at the time the error was made which caused the loss (*k*), that is, at the date of the previous rectification, for the value of this property had in fact risen sharply through the years. In 1939 Mrs. G.'s solicitors had certified its value as being £608. In 1954 it was sold for £750 by K. to Mrs. S. and it was then that Mrs. G.'s name was removed from the register. The house was recently sold for £2,750. Mrs. G.'s valuer put its value as at the date of rectification at £1,150 but after the claim had been considered by the District Valuer, it became clear that Mrs. G. could not recover more than £750 and the Chief Land Registrar ordered the payment of this sum to her and the payment of £46 for costs to her solicitors.

Where indemnity is paid for a loss, the Chief Land Registrar is entitled, on behalf of the Crown, to recover the amount paid out of the Land Registry insurance fund from any person who has caused or substantially contributed to the loss by his fraud (*l*) as, in the circumstances described, K had clearly done. But K, like many of his kidney, was not only a man of straw but a nomad besides, so that this right of recourse lost its worth in this instance.

From time to time some rather naive statements appear in print about the effect of the provisions as to rectification and indemnity and it may be that some readers will be inclined to deplore the fact that Mrs. G., although compensated, lost her property, whilst they fail to give weight to the alarming losses that other innocent persons might have incurred. Therefore, it may be of interest to record, side by side, what actually happened and what would probably have happened had the title been an unregistered one.

Registered title	*Unregistered title*
Mrs. G. could not recover her house. It had long been up for sale and she received the equivalent of a fair price as at the date of her deprivation (with costs).	Mrs. G. would recover her house and could sell it at an enhanced price, but she would have been put to the inevitable expense of litigation.

(*i*) Land Registration Act, 1925, s. 83 (2).
(*k*) *Ibid.*, s. 83 (6).
(*l*) *Ibid.*, s. 83 (9).

Registered title	*Unregistered title*
The latest purchaser in possession kept the house.	The purchaser in possession would have been evicted by Mrs. G., losing his house, and £2,750, and costs. He would have a right of recourse against previous purchasers and a worthless right against K.
Intermediate purchasers and mortgagees were not affected.	Intermediate purchasers and mortgagees would have engaged in, or been joined in, litigation, with consequent expense. The earliest of them would have suffered judgment as K. was a man of straw.

Conflict between Registered Titles

It surely cannot often happen that two or more persons are, by mistake, registered as proprietors of the same registered estate but the legislature contemplated that it might happen (*m*) and it has now come about. In January, 1953, Mrs. X and Mrs. Y were registered as joint proprietors with absolute title to a plot of land depicted on the plan to a transfer of part in their favour. In February, 1953, in pursuance of a transfer from the same vendor, Mr. Z was registered as proprietor of an adjoining plot and also of part of the land already contained in the registered title of Mrs. X and Mrs. Y. There was, in fact, an overlap in the two transfer plans which was repeated in the filed plans of the two registered titles. The plans on both transfers were poor in quality, faulty and inaccurate, and future trouble would have been avoided if the Land Registry Plans Branch had refused to register Z's transfer until its plan had been amended. Fences had not then been erected and instead of insisting upon a proper plan the Plans Branch showed the dubious boundaries by dotted lines on each filed plan and endorsed a statement on each that the boundaries had been plotted from the transfer plans and were subject to revision on survey.

Before long a boundary dispute developed and the Chief Land Registrar gave notice of his intention of rectifying the filed plan of Z's title (which, of course, formed part of the register (*n*)) with the consent of all interested parties (*o*), Z's transfer being later in its date of execution and its date of registration than that of Mrs. X and Mrs. Y. On receiving this notice Z through

(*m*) *Cf.* the Land Registration Act, 1925, s. 82 (1) (e).
(*n*) *Cf.* Land Registration Rules, 1925, r. 3 (1).
(*o*) Under the Land Registration Act, 1925, s. 82 (1) (c).

his solicitors applied to the Chief Land Registrar to hear and determine the dispute (*p*). Both parties appeared by counsel, witnesses were called, and in the result the Chief Land Registrar came to the conclusion that the transfer plans were for the purpose of identification only and that the intention of the parties had been that the precise line of the common boundary should be determined in conjunction with the vendor's architect. Therefore he ordered rectification of the title of Mrs. X and Mrs. Y by excluding from it the strip of overlapping land. Revised filed plans were prepared for both titles accordingly and Z erected a fence along the new boundary. Although the strip they were thus deprived of was slender enough to have no apparent significance, Mrs. X and Mrs. Y alleged that by losing it they suffered considerable consequential damage. Thus a garage erected by Z blocked out their light and his fence was now so close to their front door as to make access to it difficult. They submitted the following claim (the figures have been rounded) as persons who had suffered loss by reason of a rectification of the register (*q*):—

	£
Estimated depreciation of property	200
Z's taxed costs	82
The costs of their own surveyor, solicitor and counsel	92
	£374

After a full consideration of this claim by the trustees of the Land Registry insurance fund, the Chief Land Registrar ordered payment of it in full.

(*p*) Under the Land Registration Rules, 1925, r. 298.
(*q*) Under the Land Registration Act, 1925, s. 83 (1).

THE CONTROL OF HIRING, HIRE-PURCHASE AND CREDIT SALE AGREEMENTS, 1956

By John Ward, Barrister-at-Law

Everyone knows that the recurring national financial crises have driven the Chancellor of the Exchequer to take progressively more stringent measures to check the internal consumption of those goods the possession of which increases the standard of living in the home. Not only is there a demand for such new or second-hand articles as motor-cars, washing machines, dry shavers and the like but also there is a competitive pressure within the trade to sell them and to encourage demand for them. Between these opposite forces there stand the new Control Orders, the Control of Hiring Order (S.I. 1956, No. 179) and the Hire-Purchase and Credit Sale Agreements (Control) Order (S.I. 1956, No. 180), and it is the purpose of this brief article to survey the new measures which have been imposed.

It may be recalled that hire-purchase and credit sale agreements, where the price does not exceed £300, or in the case of livestock £1,000, are now by the 1954 Hire-Purchase Act subjected to the general conditions of the 1938 Hire-Purchase Act, and the requirements of the 1956 Orders as set out below are additional to those conditions.

For convenience the different types of transaction will be dealt with separately.

Credit sale agreements

These are defined as contracts of sale of goods under which the whole or part of the purchase price is payable by instalments. Where such an agreement was entered into before February 18, 1956, and provides for the instalments to be spread over a period of less than nine months, or was entered into on or after that date and provides for the price to be paid by approximately equal instalments at equal intervals spread over a period of less than nine months (38 weeks is a popular period), commencing with the date of the agreement, the transaction is expressly exempt from the 1956 Order.

Hire-purchase and credit sale agreements

The Hire-Purchase and Credit Sale Agreements (Control) Order (S.I. 1956, No. 180) brings under control the disposal under agreements entered into after February 17, 1956, of many items additional to those which were controlled under the 1955 Orders (S.I. 1955, No. 297 and 1955, No. 1130) and it alters and increases the list of items specifically free of control, which are set out in Part II of the First Schedule. The additional goods brought under control are: loud-speakers; television conversion units; tape recorders; drying machines; knitting machines; lamp standards; lampshades; sink units and parts; baths; basins and bathroom fittings; trailers; shop and office furniture and fittings, other than furniture of a type suitable for domestic use; sidecars; aircraft (including gliders); ships and boats; fixed and movable plant; machinery; appliances; equipment and apparatus of all types and parts thereof which are not specified in any item of Schedule I. All photographic cameras and photographic enlargers and lenses therefor and projectors are brought under control, as are all sectional sheds and garages and other sectional or prefabricated buildings and all mechanically propelled vehicles and chassis. Perambulators, baby carriages and push chairs are no longer subject to control. The 1956 Order does not specify as free from control vehicles constructed to carry not less than twelve passengers, cinema projectors of 35 mm. gauge and over or agricultural buildings and greenhouses, as did the previous Order. Additional goods now declared free from control include livestock; medical, surgical, dental and veterinary appliances, equipment and apparatus; water heating appliances (whether or not with provision for gas ignition or electrically operated combustion controls) designed to burn solid fuel only; seagoing ships constructed or adapted for the commercial transportation of goods or passengers, tugs and fishing vessels and goods disposed of to any person as equipment for such a ship, tug or vessel owned or chartered by him; and aircraft capable of carrying more than ten persons.

Moreover, the Order increases the minimum percentage of the aggregate cost comprising both the cash price and the amount payable for installation and maintenance, which must be paid before the signing of the first agreement; where it was $33\frac{1}{3}$ per cent. before it is now 50 per cent., and where it was 15 per cent. it is now 20 per cent. A new defence is provided, by which the onus of proof is put upon the defendant to show that the goods were to be or had been exported at the time of the alleged contravention.

The principal conditions to be observed are:—

(1) The minimum percentage for the particular class of goods laid down in the First Schedule must be paid in advance of signing the first agreement, but this can include an allowance reasonable in value for goods taken in part exchange (thus striking at sham part exchanges).

(2) The balance must be paid by approximately equal instalments at equal periods spread over a period which must not exceed the period specified in the First Schedule for that class of goods. For the majority of goods the period specified is twenty-four months. For certain washing machines and washers, cookers, including solid fuel cookers, and water heating appliances, the period is forty-eight months. This method of payment would seem to be more popular than the alternative. The other mode of payment under a hire-purchase agreement is that the balance must be paid in a lump sum within three months from the date of the first agreement (the Order defines "hire-purchase agreement" to include two or more agreements, none of which by itself constitutes a hire-purchase agreement, where the composite effect of all agreements read together is a bailment of goods and either the bailee may buy them or the property in them will or may, in any circumstances whether by act of a party to the agreement or not, pass to the bailee: which two or more agreements are to be treated as a single agreement made at the time of the last of the agreements).

(3) The agreement must be in writing.

(4) The agreement must contain a statement of the cash prices item by item of the goods and of the amounts for installation or maintenance of each item.

This Order is not retroactive except as to transactions before February 18, 1956, which were in breach of the provisions of the 1955 Orders otherwise revoked by the present Orders. Any agreement which is varied after February 17, 1956, so that the effect of the variation taken together with the original agreement is to contravene the requirements of this Order (*e.g.*, by extending the period for the payment of instalments so that the aggregate period exceeds that laid down in this Order for the particular class of goods) renders all parties to the variation offenders against the Order.

Some further points may be noted. For the first time the following items are brought under control—aircraft (including gliders), ships and boats, fixed and movable plant, machinery appliances, equipment and apparatus of all types, and parts thereof, not specified in any other item in Part I (First Schedule, Part I). There is a very slight alleviation in respect of these items, if bought

under a credit sale agreement which provides for payments on account of the goods but before delivery of them; in this event, actual payment of 50 per cent. of the amount which would normally have to be made before the signing of the agreement (whether in a lump sum or not) before delivery is to be construed as payment before signing the agreement, and where this is done the period for the payment of the balance (the maximum is twenty-four months) commences with the date of delivery and not with the date of the agreement.

If any uncontrolled goods (*i.e.*, goods not specified in the First Schedule, Part I) are included with controlled goods in a hire-purchase or credit sale agreement, they are caught by the Order (see item 25 of Part I). Where uncontrolled goods are included in a credit sale or hire-purchase agreement with goods subject to the Order, the minimum percentage of the cash price payable before the signing of the agreement is the lowest percentage specified in relation to goods subject to the Order described in any other item comprised in the agreement; the maximum period for the payment of the balance is the longest period prescribed for such goods.

Hire agreements

The Control of Hiring Order (S.I. 1956, No. 179) controls the disposal and possession of goods under hiring agreements, entered into after February 17, 1956. It specifically exempts from control the following transactions:—

(a) Where possession of the goods under the hiring agreement or variation or renewal thereof is not to exceed a total period of one month.

(b) Where the hirer will not be in possession of the goods for more than twelve days in any period of twenty-eight days.

(c) Those made under the authority of the Board of Trade Licence.

The Order applies to the new or second-hand goods described in the First Schedule and these are goods chiefly suitable for use in the home.

The goods to which the Order applies are:

(1) Radio receiving sets and television receiving sets (including portable sets and sets designed for use in road vehicles) whether or not assembled and whether or not complete; television aerials, cathode ray tubes, loud-speakers and television conversion units.

(2) Gramophones, radio-gramophones, record players and tape recorders.

(3) The following appliances and apparatus, whether mechanically operated or not, being appliances or apparatus of a kind designed or suitable for domestic use: space heating appliances; dishwashers; drying cabinets and drying machines; washing machines and washers, excluding washing machines and washers which are designed for heating water by electricity or gas, but which are not otherwise designed for operation by electricity or gas; ironing machines and irons; wringers and mangles; pressure cookers; floor polishers; vacuum cleaners; water softeners; refrigerators having a storage capacity not exceeding 12 cubic feet; machines for mixing, extracting and preparation of food and drink; electric kettles and other cooking utensils incorporating heating elements, including electric hot-plates; dry shavers electrically operated; sewing machines; knitting machines; hair drying machines.

All hiring agreements must be in writing; but thereafter the Order divides hiring agreements into two kinds and sets out appropriate conditions. The first is an agreement for a definite period of nine months or less. In this hiring, before the agreement is signed actual payment must be made of the aggregate of all rentals for the full period and all fixed or ascertainable charges in the full period for services still to be performed in connection with the hired goods, whether services already contemplated under the hiring agreement or under a related agreement made already, or under an agreement still to be made relating to the hired goods and the making of which was a condition for entering the hiring agreement. It would seem that the wording of this provision as I have paraphrased it is sufficiently comprehensive to prevent any lawful by-passing of the control.

Subject to a lawful renewal of the hire agreement where the extended period and original period together do not exceed one month's hire, it is not permissible to make any agreement whereby the same goods which have already been on hire for a definite period of nine months or less may be hired to the same person for a second time.

The second type of hiring agreement is that described as one for a definite period of more than nine months or for an indefinite period. If such an agreement includes only one item of goods within the First Schedule together with other goods not controlled, then all the goods in the agreement are subject to these conditions. The first condition is for the payment of the same amounts in advance as are required in the first type of hire (see above) except that the amounts are limited to all rentals and all fixed or ascertainable charges (under the agreement or related agreements) which

fall due in the first nine months from the date of the signing of the agreement. Such payment in advance does not apply to the renewal or extension of an original hiring agreement for a definite period exceeding nine months where such renewal or extension takes effect immediately on the expiry of that period. The second condition sets out the terms of the hiring agreement as to payment of later rentals and charges which may be payable at weekly, monthly or quarterly intervals. Rentals and charges need not coincide for payment by reference to the same periods but once the period in respect of either has been fixed that period must remain the same throughout the hiring, *e.g.*, rentals may be weekly and charges quarterly. The first such period must commence on the date of the signing of the agreement. Of course the first periodical payment is not due until nine months have expired from that date. After the nine months have expired, no rental or charge may be greater than the smallest payable in respect of any period during the first nine months. Furthermore any renewal or extension of this agreement cannot provide for any increase upon the smallest rental payable before the renewal, or extension.

Variations of hiring agreements entered into before or after February 17, 1956, are unlawful when made so as to comprise in the agreement goods controlled by the Order which were not included in the original hiring. Variations of hiring agreements entered into after that date are unlawful if they affect any payment made in accordance with the Order before the agreement was signed, or if any payment to be made is increased or if any periods for which payments are to be made are varied.

All parties in breach of either Order commit an offence, and for such a breach the penalties are laid down by Regulation 92 of the Defence (General) Regulations, 1939. On summary conviction the penalty is imprisonment up to three months or a fine up to £100 or both. Upon conviction on indictment the sentence may be imprisonment up to two years or a fine up to £500 or both imprisonment and fine.

Conclusion

It is submitted that the two Orders together regulate all possible dealings with the controlled goods short of an outright sale where the full price is paid. The 1952 Order (S.I. 1952, No. 121) defined "hire-purchase Agreement" by reference to its definition in section 21 of the 1938 Hire-Purchase Act which is not the same definition as that in the 1955 and 1956 Orders. The difference lies in the addition of the words "whether on the performance of

any act by the parties to the agreement or any of them or in any other circumstances" referring to the contractual term that during the bailment the bailee may buy the goods or the property in the goods will or may pass to the bailee. These words cover what Mr. Laski, Q.C., in his successful argument in *R.* v. *R. W. Proffitt Ltd.* [1954] 2 Q.B. 35, at pp. 38 and 39, described as the speculative *in futuro* right or the right contingent upon something outside the document. At the termination of the two-year hiring agreement (as by implication Jones J. in that case held it to be as a matter of law) there was this option "Subject to the enactment of the necessary legislation to purchase the above-mentioned television set and the said aerial for the sum of one shilling." As a result of the additional words in the definition it is submitted that under the 1955 and 1956 Orders the agreement made in *Proffitt's* case would now be held to be a hire-purchase and not a hiring agreement.

Obviously the purpose of requiring the agreements to be in writing is to have a record which can be seen by Board of Trade inspectors. Whether the inspectors will find it easy or difficult to enforce the law remains to be seen; and I do not wish to strike a wry cynical note but I wonder how long a time the average county court judge would allow a debtor to pay off the arrears of a thirty-eight week credit sale debt.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Lever Finance Ltd. v. *Needleman's Trustee*
[1956] 3 W.L.R. 72; [1956] 2 All E.R. 378 (Ch.D.)

Mortgage—restriction on statutory power of leasing—proviso that tenant not to be concerned—estoppel against mortgagee; appointment of receiver—registered charge—mortgagee not registered as proprietor; *Law of Property Act*, 1925, *s.* 109; *Land Registration Act*, 1925, *ss.* 33, 34.—In this case the chronology of the somewhat complicated facts is important. In 1952 registered leasehold land was mortgaged by a first registered charge. Clause 8 of the charge prohibited the exercise of the mortgagor's statutory power of leasing without the consent of the mortgagee, but also concluded with the words "but it shall not be necessary to express such consent in any such lease . . . *nor shall any lessee be concerned to see that any such consent has been given.*" In 1953 the mortgagors let the first floor of the premises to the second defendants without the consent of the mortgagees. In 1954, the plaintiff company took a second registered charge. In 1955 several events occurred; on April 19 the plaintiffs took a transfer of the first registered charge, but did not become the registered proprietors till July 10. In the meantime, on April 21 they purported to appoint a receiver solely under the powers conferred by the transferred charge; the receiver demanded and received rent in both June and July. In October 1955 the plaintiffs gave notice to quit and began an action for possession in November. The only material point, as the action proceeded, was whether the plaintiffs as *first* mortgagees could obtain possession from the second defendants, the tenants.

Harman J., describing the point as novel, held first that the concluding words of Clause 8 quoted and italicised above operated as an estoppel against the plaintiff mortgagees, whereby they could not challenge the validity of the lease. (No difficulty arose from the provision that consent need not be referred to in the lease.) Secondly, he held that in appointing the receiver on April 21, 1955, the plaintiffs were not acting under the statutory power (Law of Property Act, 1925, s. 109) because they were not until July 10, 1955, proprietors of the relevant charge. The Land Registration Act, 1925, by section 34 gives to the proprietor of a registered charge the statutory powers of a mortgagee, but section 33 provides that where a charge is transferred "the transferor shall be deemed to remain proprietor of the charge until the name of the transferee is entered on the register in respect thereof." Consequently, the plaintiffs could

not argue that the receiver was, under the Law of Property Act, 1925, s. 109 (2), agent for the mortgagees; he could be no more than an ordinary agent for the plaintiffs, and his receipt of rent constituted a recognition of a tenancy in the second defendants. Whether the twenty-one year lease or only a yearly tenancy was recognised was not decided—as to this see Woodfall, *Landlord and Tenant*, 25th ed., p. 80. Harman J. was inclined to think that if the receiver had been appointed under the statutory power no such recognition would have taken place, following *Serjeant* v. *Nash Field & Co.* [1903] 2 K.B. 304.

This decision is clearly of great practical importance. Normally, of course, a lease made by a mortgagor without consent binds him but not the mortgagee—see *Dudley and District Benefit Building Society* v. *Emerson* [1949] Ch. 707. Yet the offending words italicised above are perhaps not a mere rarity; they are included without comment in the precedents in Prideaux, 24th ed., Vol. II, pp. 433–434, but in the *Encyclopaedia of Forms and Precedents*, 3rd ed., Vol. 10, p. 127, there is a warning note that their inclusion is likely to have the effect decided in the instant case; they do not seem to appear in *Key and Elphinstone, e.g.*, 15th ed., Vol. II, p. 77. Where such words exist the position would seem to be that, though the lease binds the mortgagee, there is a breach of covenant causing the power of sale to become exercisable—compare *Public Trustee* v. *Lawrence* [1912] 1 Ch. 789 on similar words in (now) the Law of Property Act, 1925, s. 99 (11), requiring the mortgagor to deliver a counterpart of any lease to the mortgagee.

The second point emphasises the importance, in transactions with registered land, of regarding title as passing not on completion in the usual technical sense but on registration of the transfer or other disposition. Between completion and registration a transferor will normally be trustee for the transferee but this will not help where, as in the present case, it is desired to exercise powers incident to the legal estate; as another example, there could be no distraint before registration—see *Schalit* v. *Nadler* [1933] 2 K.B. 79.

Regis Property Co. Ltd. v. *Redman*
[1956] 3 W.L.R. 95; [1956] 2 All E.R. 335 (C.A.)

Easement—right to hot water and central heating—not capable of passing under Law of Property Act, 1925, s. 62.—This case was principally concerned with rent restriction and is noted *infra* p. 335. It is mentioned here because the Court of Appeal (Lord Evershed M.R., Jenkins and Hodson L.JJ.) held that an obligation to supply constant hot water and central heating, involving the performance of services, was essentially a matter of personal contract, and not capable of subsisting as an easement or right that could pass under section 62 of the Law of Property Act, 1925. This decision needs to be set against the expanding concept of easements revealed in *Re Ellenborough Park* [1955] Ch. 131 (*ante*, p. 61) and *Miller* v.

Emcer Products Ltd. [1956] 2 W.L.R. 267; [1956] 1 All E.R. 237 (*ante*, p. 161). Of course rights to water that do not involve services commonly subsist as easements.

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2. *TRUSTS*

By F. R. CRANE, LL.B., Solicitor

Re Heyworth's Contingent Reversionary Interest [1956] 2 W.L.R. 1044; [1956] 2 All E.R. 21 (*sub nom. Re Heyworth's Settlements*) (Ch.D.)
Re Cockerell's Settlement Trusts [1956] 2 W.L.R. 1050; [1956] 2 All E.R. 172 (Ch.D.)

Settlement—variation of trusts—inherent and statutory jurisdiction of the court—Trustee Act, 1925, ss. 53, 57.—These two cases are noted together because in each the court was asked to sanction the familiar transaction whereby a life tenant purchases the remainderman's interest under a settlement, so avoiding the attraction of estate duty on the life tenant's death.

In *Re Heyworth* a life tenant aged seventy-four sought to purchase the interest of her grand-daughter aged twenty, one of a class entitled contingently on surviving the life tenant and attaining twenty-one. The grand-daughter was within three months of her twenty-first birthday and was being adequately maintained and trained as a nurse. Upjohn J. held with regret that he had no adequate jurisdiction. As there was no question of maintenance of the infant, or of salvage, inherent jurisdiction was excluded by *Chapman* v. *Chapman* [1954] A.C. 429. Nor could help be obtained from the Trustee Act, 1925, s. 53, authorising the court to order the conveyance of an infant's property "with a view to the application of the capital or income thereof for the maintenance, education or benefit of the infant" because it could not be shown that the property would be needed in any way for the infant's benefit in the three months before she attained twenty-one. The learned judge added that if this could have been shown, he did not doubt the court had ample jurisdiction, stating that the words "maintenance, education or benefit" were of the widest import. Consequently where an infant's age is well short of twenty-one, section 53 of the Trustee Act may provide a reasonably broad avenue of escape from *Chapman* v. *Chapman*, and one not restricted, like that under the Settled Land Act, 1925, s. 64, by technicalities concerning the nature of the trust property. It has been previously held that an entail can be barred on behalf of an infant under section 53: *Re Gower* [1954] Ch. 365.

In *Re Cockerell* the applicant was entitled, subject to the life interest of his mother, to a reversionary interest under a settlement of 1913. He had resettled part of this reversionary interest in 1948 but without giving the trustee bank power to sell before the interest fell into possession. Upjohn J. held that he had both statutory

jurisdiction under the Trustee Act, 1925, s. 57, and inherent jurisdiction (following *Re Wells* [1903] 1 Ch. 848, approved in *Chapman* v. *Chapman, supra*) to sanction a sale by the trustee of the 1948 settlement to the life tenant under the 1913 settlement. Upjohn J. observed that his order would not in the least degree alter the trusts of the 1948 settlement. At first sight this appears to ignore the effect of the order on the 1913 settlement, but it must be noted that that applicant and his mother would, but for the 1948 resettlement, have been able to terminate the 1913 settlement so far as his interest was concerned. Contingent interests were not here involved.

Two further comments may be made. First, that Upjohn J. emphatically regarded both transactions as beneficial to the parties. A similar view has been taken in other cases since *Chapman* v. *Chapman, supra*. At present the courts show no reluctance to umpire a " game of chess " between beneficiaries and the Revenue. Secondly, in *Re Heyworth* the learned judge said that to call the transaction not a case of altering trusts but of selling the infant's interest was " with all respect, a mere play upon words . . . the net result is, that if the transaction goes through, the trusts are varied or terminated " ([1956] 2 W.L.R. at p. 1050; [1956] 2 All E.R. at p. 24). Consequently it seems that a sale to a life tenant of a reversionary interest at actuarial value cannot be treated as merely a matter of investment; therefore the tentative suggestion to that effect in the note to *Re Forster's Settlement* [1954] 1 W.L.R. 1450; [1954] 3 All E.R. 714—*ante*, Vol. 19, p. 62—must now be withdrawn, and that case must be regarded as turning on its own special facts.

Re Pelly's Will Trusts [1956] 3 W.L.R. 26; [1956] 2 All E.R. 326 (C.A.)

Settled land—improvements and repairs—payment out of capital —whether tenant for life accountable for income tax allowed.—The Court of Appeal (Lord Evershed M.R., Jenkins and Hodson L.JJ.) has reversed the decision of Wynn-Parry J., noted *ante*, p. 66. As a result a tenant for life may take advantage of his statutory right to have running repairs paid for out of capital (under the Settled Land Act, 1925, ss. 73, 75 and the Agricultural Holdings Act, 1948, s. 96) and may claim income tax allowances on such payments without having to account to the trustees of the settlement for any such allowance. The court recognised the application of the rule that a trustee must not profit from his trust to a tenant for life, but held that it must be modified by reason of his dual position and his statutory powers. The decisive point, in the view of the court, was that under the settlement the tenant for life was entitled to the whole of the income, and by statute to the payment for repairs; income tax was a personal liability reducing the amount of income available to him and irrelevant to his relationship to the remaindermen. The logic of this reasoning can be demonstrated by considering the position if no tax were exigible—the tenant for life would then get both benefits without deduction. This decision may well save a good

deal of litigation, because the extent of liability enunciated in the court below was somewhat uncertain. It should be noted that in this case the capital payments were by way of recoupment to the tenant for life and apparently in these circumstances the repairs allowance can be claimed; it is desirable to ensure so far as possible that the payments are made in a way which will attract the allowance.

Re Gresham's Settlement, Lloyds Bank v. *Gresham* [1956] 1 W.L.R. 573; [1956] 2 All E.R. 193 (Ch.D.)

Discretionary trust—taking effect as power—certainty of objects —unidentifiable persons—indivisible power.—It is well settled that the objects of a power need be certain only in the sense that it must be possible to say whether any given person, to whom it may be desired to appoint, is or is not within the class of objects (*Re Gestetner* [1953] Ch. 672). In the present case the trustees of a discretionary trust were not bound to make any distribution, so in fact only a power was created. (Compare *I. R. C.* v. *Broadway Cottages Trust* [1955] Ch. 20, noted *ante*, Vol. 18, pp. 317 and 509, where there was a trust, so that the objects had to be capable of complete enumeration at any moment.)

The objects here included a beneficiary's wife, children, remoter issue and—on the court's construction of some obscure wording—any persons by or with whom the beneficiary might from time to time be employed or residing. Harman J. held the power void for uncertainty; there would be a number of persons "of whom it could not be postulated that they were (or were not) within the drag-net of this clause" ([1956] 1 W.L.R. 578; [1956] 2 All E.R. 196). In consequence the principal beneficiary, who was entitled to the capital subject to the discretionary power, was able to terminate the settlement. The learned judge distinguished, on their different wording, *Re Gestetner, supra*, and *Re Coates* [1955] Ch. 495 (noted *ante*, Vol. 19, p. 64), describing the latter as a strong decision. He also held that the power here was one and indivisible and could not be construed as two or more powers, some good and some bad.

Re Weiner, deceased [1956] 1 W.L.R. 579; [1956] 2 All E.R. 482 (Ch.D.)

Trust—beneficiary absolutely entitled—right to demand transfer of property unless special circumstances to contrary.—"Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law"—*per* Cozens-Hardy M.R. in *Re Marshall* [1914] 1 Ch. 192 at p. 199. Such indefeasible title may occur either by appropriation of particular property to a particular share or bequest, or because persons become entitled to

a share of residue or of a trust fund. Where the property is personalty, and readily divisible, such as stocks and shares, the rule will apply unless special circumstances can be shown. The desire of trustees or other beneficiaries to maintain control in one hand of a public or private company is not normally a special circumstance: *Re Marshall, supra*; *Re Sandeman's Will Trusts* [1937] 1 All E.R. 368.

In the present case the trust fund was held on trust for sale; the plaintiff was now entitled absolutely to 45 per cent. of the capital, the other 55 per cent. being settled; the trust fund consisted of 125,000 shares (being 75 per cent. of the whole) in a private company. Harman J. held that the fact that transfer of the plaintiff's share would divide control was not, of itself, sufficient to warrant postponement of transfer (following *Re Sandeman, supra*). Presumably an arguable case would arise if an outsider was bidding for control of the company, and the beneficiaries differed as to the desirability of accepting the offer.

Where land is involved a person entitled to an undivided share could not insist on a conveyance because this would probably reduce the value of the land: *Re Kipping* [1914] 1 Ch. 62. After 1925 trustees for sale have powers of partition, with the consent of any beneficiaries of full age (not being merely annuitants)—Law of Property Act, 1925, s. 28 (3) (4); disagreement may be resolved by a sale or by an application to the court under section 30 of the Act.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Associated Artists, Ltd. v. *I. R. C.*
[1956] 1 W.L.R. 752; [1956] 2 All E.R. 583

Educational—artistic dramatic productions—not charitable.—It is quite extraordinary the number of cases in which ambitious enterprises are launched, presumably attended with great care and expense, only to founder in some main respect on an error of draftsmanship. In the instant case, on the initiative of the well-known actor John Clements, a company was formed to present educational, classical, cultural and artistic plays. Upjohn J. held that these words must be construed disjunctively, so that the plays might all be artistic without necessarily being educational. He proceeded to hold that "artistic" plays were not charitable in nature. It is difficult to disagree. There are many rival definitions of art, from works of creative imagination to activities of a skilful executory type, but none of these has much in common with any known charitable objects in the legal sense. Had the draftsman used a few more syllables it seems clear that the company would have enjoyed the privileges in matters of revenue which it was intended to have. The learned

judge pointed out that up to date all its plays had in fact been "educational" but this was not decisive. Restoration or eighteenth-century comedy may not strike all persons as particularly edifying. If educational it might be pertinent to ask in what or for what it educates. However, being respectably old, it presumably becomes classic and so educational. There is a clear class distinction in such matters. The irreverent sometimes say that dirt is excluded from the radio—unless it is on the Third Programme. The decision in this case is also in accordance with current trends. There was some indignation, both inside the theatrical profession and among the general public, when the brilliant but squalid "Streetcar Named Desire" was given an exemption from entertainment tax. The law must be vigilant to maintain a control over what is really in the public interest and what is self-interest, however enlightened. The realm of public taste is one into which the lawyer enters at his peril and the law must be so interpreted as to preserve him from any such hazards.

Royal Choral Society v. *I. R. C.* (1943) 25 T.C. 263 was cited in this case, but counsel do not appear to have gone very far afield to find other, fairly relevant authorities, on the broader issues of principle.

(Theobald 340)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Murray [1956] 1 W.L.R. 605; [1956] 3 All E.R. 353

Dependent relative revocation—change of terms but not of beneficiary.—It is generally agreed that the doctrine of dependent relative revocation has long since ceased to justify its existence in terms of the presumed intentions of testators. Yet the intention of the testator remains the avowed basis for this doctrine. The effect is to leave the court a wide discretion in deciding when and when not to apply the doctrine. The court now appears to share the general distrust of the doctrine and will not be too officious in finding reasons for its application if it can be avoided. In the present case a testator had used one name clause in his will and another in his codicil. The clause in the codicil has been held void by the Court of Appeal (noted, Vol. 18, p. 614). Harman J. here held that this did not revive the original name clause in the will. There was no intestacy threatening in this case, and the dislike of conditions by the courts appears from numerous modern cases. The codicil had expressly revoked the clause in the will, and a different clause was substituted, but intended to achieve the same object. The court held that there was no indication that this revocation was conditional on the validity of the clause in the codicil. *Re Bernard's Settlement* [1916] 1 Ch. 552 was distinguished, because in that case there was a single purpose but the

purpose was to benefit a particular beneficiary, and the doctrine of dependent relative revocation was applied. It must be borne in mind that the doctrine may not necessarily operate in the same way where a particular provision is revoked as it does where an entire testamentary instrument is revoked. The learned judge pointed out that we cannot be sure what the testator would have done if he had been told that the condition in the codicil might be ineffective. Yet courts in the past appear to have done just this in applying the doctrine of dependent relative revocation. The solution appears to be this; that the intention which must be construed as conditional is the intention to revoke, not the general intention underlying the changes in the will. Here it is likely the testator would have liked the name clause in the will to operate if the clause in the codicil did not—yet this was not allowed to happen. In other cases the testator clearly did not want the original provisions of his will to operate, yet the courts have held that they must! The solution does have this much in its favour, that the intention to revoke absolutely or conditionally appears more objective than the surmise as to what the testator would have liked to happen. Yet, in the result, can these two intentions really be clearly extricated from each other?

(Theobald 48, 635, 637)

In the Estate of Yahuda
[1956] 3 W.L.R. 20; [1956] 2 All E.R. 262

It is well established that if the testator's will is duly proved in the country of his domicile it will be given ancillary probate here without further evidence of its validity. There are many old authorities for this and it is so stated in the books. The instant case will provide a useful modern reference, but otherwise was hardly worth reporting.

(Theobald 3, 85)

Re Callaway [1956] 3 W.L.R. 257; [1956] 2 All E.R. 451

Bequest lost on grounds of public policy—consequential effects.—This is a case of rare importance. There have been numerous cases in which felons have been held disqualified from benefiting from their crimes by taking benefits under their victim's wills or intestacies. The precise consequences for other interested parties have been left vague in the reports. Vaisey J. has here clarified the law and put it on a strong footing. Emily Callaway had two children, Albert and Jeanette. It was admitted by all parties that Jeanette had feloniously killed Emily and then committed suicide. (This saved the trouble of a separate inquiry. It is well known that a criminal conviction or the result of a coroner's inquisition is not binding on a civil court, and *Re Crippen* [1911] P. 108 has been criticised in this connection.) As Emily left her entire estate to Jeanette her will became completely

ineffective. Under the law of intestacy both Albert and Jeanette would normally have taken. It is clear, and is laid down in *Re Sigsworth* [1935] Ch. 89, that Jeanette could not benefit under the law of intestacy either. The interesting question now arose: would Albert take all, would he take half, or would the Crown take all? Vaisey J. gave the whole estate to Albert, as "alone qualified to take under the intestacy." Here the learned judge followed the *Maybrick* case, *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147. In the *Maybrick* case a man had a wife and children. He took out an insurance in favour of the wife which gave her a third-party claim under section 11 of the 1882 Married Women's Property Act. She killed him feloniously and so lost her third-party claim. Her estate also lost any claim to benefit from her husband's estate. Their children, claiming through him and not through her, were held entitled to the policy moneys. The rule of public policy, said Lord Esher (at 153) "ought not to be stretched beyond what is necessary for the protection of the public." Fry L.J. (at 159) held that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights.

It is submitted, with respect, that there is no foundation for the qualms felt by Vaisey J. in the present case. Left to himself the senior Chancery judge admitted that he would have felt inclined to give half, or all, to the Crown as *bona vacantia*. The Administration of Estates Act, 1925, s. 46 (1) (vi), which is the Crown's title to *bona vacantia*, does not, however, in terms apply to any case where the decedent, in this case Emily, left issue. If the Crown claimed through Jeanette they would be ignoring the Forfeiture Act, 1870, which abolished forfeitures for felony. It is true that the rather paradoxical result was to give Albert an estate he had never been intended to have, as a result of a crime which was a mere accident from his point of view. Still the logical mechanics of the situation seem to demand this result. The Crown has been generous in the past in failing to press any claim against the relatives, and in many of the cases has not even been represented, though sometimes being given the opportunity.

(Theobald 116, 683)

Re Eve [1956] 3 W.L.R. 69; [1956] 2 All E.R. 321

Solvent estate—abatement—order of application of assets—beneficial option.—A testator died in 1954. The estate was solvent but the residue was insufficient to meet his debts and it was necessary to resort to some of his legacies and reduce them proportionately. The point raised in this case concerned an option given by his will to his son Robert to buy 1,000 of the testator's shares at par (£1,000). These shares were worth considerably more, so that in effect Robert received a benefit of, say, for the sake of argument, £500. The question was, how should this £500 be classified for abatement purposes? The scheme laid down in Administration of Estates Act,

1925, s. 34 (3) and Sched. I, Part II is silent on this matter. The son could not rank as a specific legatee. For one thing he was not left a specific thousand shares but just any thousand out of a larger number. Again his real legacy was of the benefit of the option rather than of the shares themselves and more like a demonstrative legacy. Roxburgh J. held that Robert could rank in the most preferred position, at the end of the scale. The report is short and the principle not clear. Perhaps the schedule is treated as an order of primary liability for debts not only relatively within itself but also absolutely, so that all other types of testamentary provision are less liable than any provisions which do fall under the Schedule. Or perhaps the optioner is treated as almost a purchaser for value, and therefore as something better than a legatee. The learned judge did emphasise the right of such an optioner to receive his legacy free from incumbrances, such as charges on the shares, and this may lead one to suppose that the testator meant him to take free from debts so far as this was possible. The case is really a reflection of the case of *Re Fison* [1950] Ch. 394, which is more fully reported, though there the gifts were specific. In *Fison* the court quoted a dictum of Warrington J. in *Re Wilson* [1908] 1 Ch. 839, quoting a valuable dictum from an Irish case: "The element of bounty does enter into the matter; but the bounty conferred is the right to become a purchaser on advantageous terms, and not a devisee of the estate." It was said in *Fison* (at 404) that "for some purposes it is plain that they are to be regarded as purchasers if and when they exercise their option." These cases illustrate the fertility of our law which is able to evolve new principles and apportionments even on the very skirts of a consolidating statute, and the dangers of codifying our law in such a way as to sterilise this growth.

(Theobald 207, 688)

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Dominant Sites Ltd. v. *Berkshire County Council*
(1956) 6 P. & C.R. 10

Control of advertisements—"business premises."—This was an appeal to Quarter Sessions on a prosecution for displaying an advertisement without consent. The advertisement concerned was an advertisement for "Bovril," displayed on a large hoarding in the forecourt of a roadside café where Bovril was served. The defence was (see Reg. 12, Class IV, of the Control of Advertisements Regulations) that the advertisement was an advertisement "displayed on business premises" and relating to goods sold there, etc., the forecourt of a roadside café, where the customers' vehicles stand, being an essential part of the premises. Held that the defence failed:

"business premises" for this purpose (see Reg. 6 of the 1949 Amendment Regulations) must be a building, and the forecourt was not part of the building. Nor was the advertisement "within a building" within Reg. 3 of the main (1948) Regulations. An appeal by Bovril Ltd., however, was allowed, on the ground that they were not liable upon breaches of the Regulations for which their advertising agents were responsible.

Barber v. *Central Land Board* (1956) 6 P. & C.R. 20

Depreciation of land values—land disposed of by gift.—In 1951, certain land was held by a husband and wife on trust for sale for themselves. The husband gave his share to their son, the husband assigning his beneficial interest and the husband and wife together appointing the son trustee in place of his father. After the Town and Country Planning Act, 1954, claims were made (and appealed to the Lands Tribunal) under s. 7 of that Act for payment of the development-value claim, on the ground that the land had been disposed of by gift during the relevant period: one claim being made by the husband alone, and one by the husband and wife jointly. Both failed: the husband's, because he alone had not been "the holder of a claim holding"; the joint claim, because, first, the wife had not joined in the disposition of the beneficial interest (so that it was not a disposition by "the holder of a claim holding") and, secondly, the whole beneficial interest had not been disposed of but only the husband's share. The moral, if any, of this case seems to be that planning law and trusts for sale do not mix.

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6. *LANDLORD AND TENANT CASES*

By Donald Keating, b.a., Barrister-at-Law

Labone v. *Litherland Urban District Council*;
Liverpool Co-operative Society and Gourley Bros. (*Third Parties*)
[1956] 1 W.L.R. 522; [1956] 2 All E.R. 215

Covenant by lessor not to permit adjacent premises to be used for the trade or business of bread and confectionery.—This case is of particular interest to those engaged in the drafting of leases for the letting of shops on a housing estate. By the terms of the lease the lessee covenanted not to carry on any trade or business "other than that of bread and confectionery." The lessor covenanted not to permit to be carried on in adjacent premises belonging to the lessor the trade or business for which the demised premises were let. Two adjacent premises were let upon leases restricting their user to the trade or business of grocer. Both shops as part of their grocery trade sold small quantities of bread and confectionery. McNair J.

held that the class of trade or business, the monopoly of which was reserved to the lessee, was that of a bread and confectionery shop, *i.e.*, a shop in which substantially only bread and confectionery was sold. Therefore the lessees' claim for damages for breach of covenant failed.

Esdaile v. *Lewis*
[1956] 1 W.L.R. 709; [1956] 2 All E.R. 357, C.A.

Covenant "No subletting allowed"—whether subletting part a breach.—The conditions of the tenancy included the following: "No subletting allowed without the written consent of the landlord." The tenant sublet part without the landlord's consent and the county court judge, following *Cook* v. *Shoesmith* [1951] 1 K.B. 752, held that the subletting was not unlawful. The majority of the Court of Appeal (Jenkins and Hodson L.JJ., Danckwerts J. dissenting) upheld this view, applying *Cook* v. *Shoesmith* and holding (with apparent reluctance) that the condition was a condition against a subletting of the premises as a whole and that, accordingly, a subletting of part of the premises was no breach of the condition. It will be interesting to see what the result will be if the Court of Appeal ever has to consider the words, "No subletting at all allowed" (see *per* Hodson L.J. at p. 712 of W.L.R.).

Piper v. *Muggleton*
[1956] 2 W.L.R. 1093; [1956] 2 All E.R. 249, C.A.

Landlord and Tenant Act, 1954—*whether statutory tenant could be "landlord" in proceedings for new lease.*—This case decides that a statutory tenant cannot be the "landlord" for the purposes of the 1954 Act. It also indicates the proper way to constitute proceedings where the applicant for the grant of a new tenancy holds of a statutory tenant.

The respondent was a weekly tenant of a dwelling-house to which the Rent Acts applied. He lived in the house and occupied part of the shop for his business, and sublet the remainder to the applicant for the purposes of her business at a rent of 7s. 6d. per week. On August 20, 1955, the respondent served a section 25 notice on the applicant purporting to determine her tenancy and stating that he would oppose any application to the court for the grant of a new tenancy. On October 14, 1955, the applicant replied pursuant to section 25 (6) notifying the respondent that she would not be willing to give up possession at the date of termination of the notice. On December 14, 1955, she applied under section 24 (1) for a new tenancy joining as respondent to her application her landlord. On January 5, 1956, the respondent lodged an answer opposing the grant of a new tenancy. On January 21, 1956, a notice to quit was served on the respondent by his landlords and expired on January 30, 1956. The application was heard on February 3, 1956.

On these facts the Court of Appeal held that when the respondent admittedly became a statutory tenant he ceased to be "the landlord" for the purposes of the Act because he was not the owner of any interest in the property. They rejected the argument of "once the landlord always the landlord" and held that "the landlord" in the sense they had indicated was a necessary respondent to the tenant's application for a new tenancy; and that if the person joined as "the landlord" ceased to be such before the hearing then the proceedings ceased to be properly constituted. To make the proceedings effective the respondent's landlords had to be added or substituted as respondents.

Betty's Cafés Ltd. v. *Phillips Furnishing Stores Ltd.*
[1956] 1 W.L.R. 678; [1956] 2 All E.R. 497

Landlord and Tenant Act, 1954—*application for new lease—relevant time of landlord's intention to reconstruct.*—In this case Danckwerts J. considered and applied *Fisher* v. *Taylors Furnishing Stores Ltd.* ([1956] 2 W.L.R. 985; *ante*, p. 245). Further he decided that the relevant time for considering whether the landlord has a firm and settled intention to reconstruct, etc., required by section 30 (1) (f), is the time when he serves the notice of opposition to the application for a new lease. This is a new point of some importance and presumably it follows that where a landlord serves a notice of termination under section 25 the relevant time for considering his intention is the date when he serves the notice of termination.

It is understood that an appeal is pending in this case and one awaits the result with some interest in view of certain opinions expressed obiter by members of the Court of Appeal in *Reohorn* v. *Barry Corporation* [1956] 1 W.L.R. 845 (to be noted in the next issue) and in *Fleet Electrics Ltd.* v. *Jacey Investments Ltd.* [1956] 1 W.L.R. 1027, C.A.

Goodrich v. *Paisner*
[1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176, H.L.

Rent Acts—whether use in common of a bedroom is a sharing.—In this case the House of Lords reversed the decision of the Court of Appeal [1955] 2 Q.B. 353 (noted Vol. 19, p. 316). The question for their lordships was whether a tenancy of four unfurnished rooms on the first floor of a house "together with the use in common of the back bedroom on the first floor" was a sharing so as to exclude the Rent Acts. They held (Lord Morton of Henryton dissenting) that it was not such a sharing. They said that the test suggested by the Court of Appeal in *Cole* v. *Harris* [1945] K.B. 474, *i.e.*, whether there was a sharing of an essential living room, was not an exhaustive test capable of providing a solution in each case. Sharing cases must always be matters of degree in which the amount of sharing must be examined to see whether what had been let to the tenant was a

separate dwelling within the meaning of the Act. Lord Simonds, Lord Reid and Lord Somervell were of the view that there was no sharing of the bedroom so as to exclude the Acts because it could not have been the intention of the parties that the landlord and the tenant should have simultaneous use of the bedroom. They must have contemplated consecutive use. Lord Radcliffe said that the four rooms by themselves constituted a separate dwelling and this was not negatived by the tenant's right to the use of the bedroom expressed in such vague language.

Regis Property Co. Ltd. v. *Redman*
[1956] 3 W.L.R. 95; [1956] 2 All E.R. 335, C.A.

Rent Acts—increase of rates—transfer of liability for rates—transfer of burdens—Law of Property Act, 1925, *s.* 62.—This was a dispute about the recoverable rent payable by the defendant under a letting made to him in 1953. The issues fell under various heads as follows:

(1) *Rates.* The flat was built in 1936 and then rated at £41. In 1941 this assessment was reduced retrospectively from 1935 by virtue of the Rating and Valuation Act, 1925, to £34. In 1946 there was an increase in rates and in 1947 there was a transfer to the then tenant of the liability to pay rates. The Court of Appeal upheld the county court judge's findings: (i) that the correct way of calculating the increase was to take the difference between the rates payable in 1946 and those paid in 1939 on the basis of the amended valuation of £34; (ii) that the amount of reduction in the rent upon the transfer of liability for rates should be calculated on the rate payable at the date of transfer, *i.e.*, on the amended valuation of £34.

(2) *Repairs.* The first point was an application of the principle expressed in *Winchester Court Ltd.* v. *Miller* [1944] K.B. 734, C.A., that there can be a transfer to the landlord of a "burden or liability previously borne by the tenant" where a tenant is released from former repairing obligations even though the landlord does not expressly undertake the obligation previously borne by the tenant. By virtue of such transfer to himself the landlord can charge a compensating increase of rent. The second point was in the opinion of Lord Evershed M.R. (in a dissenting judgment) a novel one although the majority of the Court of Appeal (Jenkins and Hodson L.JJ.) held that it was covered by the decisions of *Winchester Court Ltd.* v. *Miller* (*supra*) and *Asher* v. *Seaforth Court Estates Ltd.* [1950] A.C. 508. Put shortly the point was this; having in 1949 taken the transfer of the burden or liability of certain repairs from tenant A and charged him an increase, could the landlord on a new tenancy to tenant B in 1953 charge by way of further increase in respect of the same burden or liability of repair the increased cost of carrying out the repairing obligation in 1953? The decision of the Court of Appeal by a majority (Jenkins L.J. and Hodson L.J.) was that he could charge 1953 costs; Lord Evershed M.R., dissenting, was of the view that he could not.

(3) *Hot water and central heating.* These services were rendered

by the landlords since 1936 but it was only in 1943 (repeated in the present 1953 tenancy) that the landlords undertook a contractual liability to perform these services. Again it was held that there had been a transfer of burden to the landlord entitling him to an increase in rent, and again the majority (Lord Evershed M.R., dissenting) held that the landlord could charge his new tenant 1953 rates although the transfer had originally taken place in 1943.

Leave has been granted to appeal to the House of Lords. If the present decision stands it appears to give landlords who have accepted the transfer of the burden or liability of repairs and/or services a means of charging any increase in the cost of such repairs and services whenever there is a new letting. They will therefore be in a much better position than their unfortunate brethren who have always been liable for such burdens or liabilities and must rely upon such relief for increased costs as the Housing Repairs and Rents Act, 1954 affords.

(4) *Section* 62. A subsidiary point upon which the court was unanimous was that a right to receive a supply of hot water and central heating could not be treated as having passed by virtue of section 62 of the Law of Property Act, 1925, since it was not a right or privilege of the kind contemplated by that section.

London Hospital Governors v. *Jacobs*
[1956] 1 W.L.R. 662; [1956] 2 All E.R. 603, C.A.

Housing Repairs and Rents Act, 1954—*right to challenge validity of notice of increase—whether carrying out repairs a variation of original agreement.*—This case decided several points under the Housing Repairs and Rents Act, 1954, as follows:

(1) That the tenant can assert in the county court that the conditions precedent to the right to an increase set out in section 23 (1) (a) have not been complied with, notwithstanding his remedy under section 26 to apply to the local authority for a certificate of disrepair.

(2) That a landlord's notice of increase is bad if it is drawn on the footing that the landlord is responsible for the whole cost of repairs, if, by the terms of the agreement under which the tenant holds, the tenant is responsible for part of the repairs; and this notwithstanding that the landlord may have in fact carried out the repairs for many years. The carrying out of such repairs is in itself no evidence of a variation of the original letting, nor of any transfer of the burden of such repairs to the landlord.

(3) That it would be a proper case for the county court to exercise its powers under section 25 (4) of the Act to amend such a notice as that referred to in (2) above, giving effect to any written agreement by the parties as to the reduction in the repairs increase to be made having regard to the tenant's liability for repairs, or failing such agreement deciding the matter under section 23 (5) of the Act.

Levermore v. *Jobey*
[1956] 1 W.L.R. 697; [1956] 2 All E.R. 362, C.A.

Rent Acts—Shop and living accommodation—whether within Acts.—Premises consisting of a shop and ample living accommodation were let to a tenant under a lease which contained a covenant that the lessee ". . . will not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose but will use and occupy the demised premises and permit them to be used and occupied as and for the trade or business of a news-vendor, stationer, bookseller, toy merchant and tobacconist only . . ." The tenant lived in the living accommodation. For the landlord it was argued that the covenant set out above confined the use of the premises to business uses so that they were not a separate dwelling within the meaning of the Rent Acts. This argument was rejected. It was held that the court in construing the lease was bound to look at the surrounding circumstances and in particular at the nature of the subject matter of the letting. When this was done it was clear that what was let was a dwelling-house and a shop the whole being subject to the Rent Acts. The covenant did not stipulate that the particular trade described should be the exclusive use of the premises but merely that that particular trade should be carried on and none other. (*R.* v. *Brighton and Area Rent Tribunal, ex p. Slaughter* [1945] 1 Q.B. 446 was applied.)

7. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports, it is cited from the *Annotated Tax Cases* (A.T.C.), *Taxation Reports* (T.R.) or the periodical *Taxation* (Taxation).)

Sun Life Assurance Society v. *Davidson* (*Inspector of Taxes*)
[1956] 3 W.L.R. 238; [1956] 2 All E.R. 642

Income Tax—Expenses of Management—Life Assurance Companies

Statutory provision: Income Tax Act, 1918, s. 33 (1) (now Income Tax Act, 1952, s. 425).

The Court of Appeal rejected the company's appeal from the judgment of Mr. Justice Harman (noted *ante*, p. 250) being likewise bound by the decision in *Capital and National Trust Ltd.* v. *Golder* (1949) 31 T.C. 265. The Crown submitted no argument on whether the latter case was rightly decided and the court was thus unable to give a duly considered opinion as to the correctness of that decision although Lord Justice Singleton remarked (at 3 W.L.R., p. 247): " If there had not been any authority on this question, I am inclined

to the view that I should have said that the expenses here in question were expenses of management." The court were unanimous in rejecting the contention that a distinction could be drawn between the stamp duty and brokerage incurred on changing investments which formed part of fixed capital, as in *Golder's* case, and similar expenses incurred in changing investments which formed part of circulating capital, as in the present case.

The crux of the case was summarised by Lord Justice Morris (at 3 W.L.R. p. 248) as follows: "It is not in contest that amounts paid by the companies in respect of brokerage and stamp duties are *sums disbursed.* Nor do I understand that it is disputed that they are *sums disbursed as expenses.* The sole dispute is whether they are sums disbursed as expenses *of management.*" Lord Justice Romer then analysed the present construction of section 425 of the Income Tax Act, 1952, after *Golder's* case (at 3 W.L.R., p. 251) as being: "*expenses of management* . . . means, in effect, the expenses of the managers of a company (who would normally be the board of directors) and not the expenses incurred by the company in the general management of its business; in other words, the phrase is directed to the expenses involved in shaping policy, and in other matters of managerial decision, and does not extend to expenses subsequently and consequently incurred at lower levels of the company's executive structure."

Leave to appeal to the House of Lords was granted, and in addition to assurance societies all investment companies must welcome this opportunity for final elucidation of the meaning of that apparently simple phrase "expenses of management."

C. I. R. v. *Buchanan* (1956) 57 Taxation 315 (Ch.D.)

Surtax—Settlement on children of settlor

Statutory provision: Finance Act, 1936, s. 21 (now Income Tax Act, 1952, ss. 397, 398, 399, 403).

Point: A life interest held upon protective trusts (see Trustee Act, 1925, s. 33) cannot be surrendered in order to accelerate the interests of the remaindermen, save in so far as they are possible objects of the discretionary trust arising on forfeiture, unless express power to surrender is given by the settlement. It is common form to insert such a power in these days of high estate duty in order that the life tenant may be enabled to expunge her interest in adequate time to prevent a passing on her death (see for example the precedent in Potter and Monroe's *Tax Planning,* p. 100). Such a surrender, taking place solely by virtue of the express terms of the instrument creating the settlement, the income becomes applicable for the remaindermen by virtue of the original settlement and not by virtue of the surrender. Hence, although where an unfettered life interest is surrendered the life tenant thereby makes a settlement within the meaning of Income Tax Act, 1952, s. 403, with the result that the income then paid to or for the benefit of his infant unmarried children is treated as his for tax purposes, no such result follows upon the

surrender of a protected life interest. No full report of this case is yet available; further comment will be made either on the full report or when the result of the anticipated appeal is known. This case could have far-reaching results as to the efficacy for tax purposes of "advances" and reorganisation of existing settlements for the benefit of children of the persons presently entitled.

Facts and decision: Property settled by will was held for the testator's son for life, then for his granddaughter for life with remainder for the granddaughter's children who should attain twenty-one. The life interests were protected but the will expressly sanctioned surrender thereof, the settlement then to take effect as if the surrenderer was dead. The granddaughter surrendered her life interest and on the following day the son surrendered his. The fund then being held for the granddaughter's children the trustees applied income for their maintenance. The Crown claimed surtax in respect of such income from the granddaughter's husband on the basis that the surrender was a "settlement," the granddaughter the "settlor," and that the children received the income by virtue or in consequence of that settlement.

Held: by Vaisey J., that the income was applicable by virtue of the will and not by virtue of the surrender.

Re Weigall's Will Trusts [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312; [1956] T.R. 113 (Ch.D.)

Estate Duty—Annuity or Annuities—Property passing —Incidence of Duty

Statutory provision: Finance Act, 1894, ss. 1, 2 (1) (b) and 14.

Point: (a) In order to raise a claim under Finance Act, 1894, s. 1, there must be property passing. If there is no identifiable property which exists before the death and persists in such existence until after the death, independently of the beneficial interests in such property, then the said section cannot be applicable. Where therefore the deceased had a chose in action which ceased to exist on his death whereupon an identical chose in action arose for the benefit of another the claim for duty arose not under section 1 but under section 2 (1) (b) of Finance Act, 1894. The case, concerning successive annuities given by will is of importance generally as showing the ability of the court to go behind the "form" of the relevant transaction in order to discover the true nature and effects of the rights conferred by the conveyancing machinery adopted (compare the recent decision of the Court of Appeal in *Re Parkes' Settlement* [1956] 1 W.L.R. 397; noted *ante*, p. 253).

(b) Where duty is payable on a slice of a settled fund due to the cesser of an interest therein and a benefit accruing thereby to the fund, such duty must be appropriated rateably over the whole fund so that the burden is borne by all persons interested therein in proportion to their interests.

Facts and decision: The testator settled his entire estate as one fund and directed the following payments:—"of the income derived

from same . . . an annuity of £5,000 to my brother . . . and in the case of his predeceasing his wife the said £5,000 to be paid yearly to [the said wife]." By a codicil the testator directed that the annuity in favour of his brother should be reduced to £3,500 "this latter with reversion to" the brother's said wife. The remainder of the income including the annuity "as and when released" the testator desired to be paid to two of his nieces, the capital being held for the nieces' children. On the death of the testator's brother (the annuitant) whose wife survived him, the trustees of the will took out a summons to ascertain whether duty was payable under section 1, Finance Act, 1894 (on the value of a continuing annuity of £3,500 per annum for the remainder of the life of the wife) or under section 2 (1) (b) (on the capital value of the proportion of the residuary estate required to produce an annuity of £3,500). If the latter charge was correct, as proved to be the case, the further question was posed as to whether the wife was liable to account for interest on a rateable proportion of the estate duty corresponding to the proportion which the sum required to produce the annuity bore to the whole of the residuary estate.

Held: The charge arose under Finance Act, 1894, s. 2 (1) (b) and the wife was liable to account as above. Harman J., after noting that the testator treated the annuities to the brother and his wife as one, nevertheless held that the annuity to the wife was a new annuity. He distinguished *Re Cassel* [1927] 2 Ch. 275 and *Re Duke of Norfolk* [1950] Ch. 467 in that the rights there in question existed independently of the beneficial interest therein. In the former case the right to have a residence kept in repair and the rent paid was a piece of property which passed, because the obligation to keep up the property was a duty of the trustees and independent of the rights of the beneficially interested parties. In the latter case an annuity for two lives was considered to be but one annuity, and the trustees had devised to them a term of 1,000 years in realty to uphold the payment. The existence of the term allowed the annuity paid to be treated as a piece of property apart from the beneficiaries' interests. In the present case a mere chose in action arose "in favour of the two beneficiaries successively on the death of the testator and on the death of the first taker and so nothing did pass."

On the question of the burden Harman J., following *Re Palmer* [1916] 2 Ch. 391, decided (at 3 W.L.R., p. 19): "Where there is a slice taken of the whole of the fund which is answerable for both the annuity and the other income payments, and where the residue gets no benefit by the cesser of the old annuity, because a new one springs up exactly in the same terms, equity demands that the various sums charged on the entirety should bear the duty rateably between them."

THE LIBRARY

Hill and Redman's Law of Landlord and Tenant. Twelfth edition. By W. J. Williams and M. M. Wells. London: Butterworth & Co. (Publishers) Ltd. ccxlii, 1533 and (index) lxxix pp. (£5 17s. 6d.)

As a result of the increasing growth and complexity of the statute law affecting landlord and tenant the present-day editors of the comprehensive textbooks on the subject are faced with a difficult choice. They must either deal with the general law of landlord and tenant first, confining themselves mainly to case law and the more fundamental statutes, and then deal separately with such special but important codes as agricultural holdings and rent restrictions, or they must try to work into a connected exposition of the whole law of landlord and tenant the relevant provisions of the special codes at the appropriate points. Each method has its advantages and disadvantages. The first method is adopted in *Hill and Redman*, the second in *Woodfall.* The difference in treatment is illustrated by the different methods by which each textbook tackles the subject of agricultural holdings. *Hill and Redman* devotes the whole of Part II to Agricultural Tenancies. There is first a chapter on the general law relating to agricultural tenancies, followed by a chapter consisting of annotated Acts, mainly the Agricultural Holdings Act, 1948. In *Woodfall* the greater part of the law relating to agricultural holdings is to be found in the chapters dealing generally with the determination of the tenancy and the rights and liabilities on determination of the tenancy. Similarly in *Hill and Redman* the law relating to the Rent Acts and the associated statutes is to be found separately in Part III: in *Woodfall* it is to be found mainly in the general chapters on rent and on recovery of the premises by the landlord. The general structure of *Woodfall* is the more systematic and logical, and the arrangement is considerably more attractive from a literary point of view. For quick reference, on the other hand, the *Hill and Redman* arrangement has its virtues. No doubt each method will have its convinced supporters. There is room for more than one first-class textbook on landlord and tenant. Here, as in other spheres, competition is to be preferred to monopoly.

The editors of the twelfth edition of *Hill and Redman*, Mr. W. J. Williams and Miss M. M. Wells, have done an excellent job. There is evidence of care and learning on every page. In Part I (General Law) the general statements of legal propositions which precede the notes are admirably concise and clear. The only criticism of Parts II, III and IV (Part IV deals with emergency legislation) which one might venture to make is that the annotations of some important sections are sometimes a little on the brief side. For example, the annotations of sections 24 and 25 of the Agricultural Holdings Act, 1948, might with advantage have been fuller. Similarly the note on subsection (3) of section 30 of the Housing Repairs and Rents Act, 1954, does mention the controversial point but so shortly that it might not impinge on a reader who is unaware of the issue. On the other hand the massive annotation of the individual sections of the Rent Restrictions Acts in Part III, necessitated by the never-ending stream of case law, makes one wonder whether this is the best method of exposition of these Acts. It is significant that both *Blundell* and *Megarry* in their specialised textbooks on the Acts have preferred the method of connected restatement to section by section annotation.

If he can afford it, I should advise the reader to buy *Hill and Redman* in addition to any other textbooks on landlord and tenant which he may already possess or be intending to acquire. If he cannot afford more than one, he must be guided by his personal preferences.

J. M. W.

Blundell's Rent Restrictions Guide. Fourth Edition. By LIONEL A. BLUNDELL and V. G. WELLINGS. London: Sweet & Maxwell Ltd. xliii and 476 pp. (£1 17s. 6d.)

A hearty welcome to an old friend! In one's pleasure at the reappearance of *Blundell* one forgets to say: why so long since the last edition? *Blundell* has a niche of its own among textbooks on the Rent Restrictions Acts. Although its size has increased since the last edition, it is still manageable, and it packs an immense amount of clear and accurate learning into a small space. It is inevitable that some comparison should be made with *Megarry*. *Blundell* is deliberately framed on a more modest scale. It does not go in for such elaborate analysis or quote so liberally from the apt judicial passage. Nor does it contain so much citation of minor authority, whether county court, sheriff court, or Dominion. To take an example of the difference: *Megarry's* Eighth Edition analyses the subject of houses let with other land or premises in eight masterly pages (pp. 86 to 94) whereas the subject is dealt with in *Blundell's* Fourth Edition in three (smaller) pages (pp. 7 to 9 and part of p. 20). *Megarry* now runs to 818 pages, *Blundell* to 476. *Blundell* is written with a sober impersonality of style. *Megarry's* pages light up from time to time with an individual sparkle. It would, however, be a mistake to compare these two first-rate works in any critical spirit. Let us instead be thankful for their respective excellences, and rejoice that practitioners in this difficult but important and busy branch of the law have such admirable mentors.

The new edition of *Blundell* is intended for use in conjunction with the Third Edition of Blundell's *Rent Restrictions Cases*. A unique and valuable feature is that the paragraph numbers in the *Guide* correspond exactly with the paragraph numbers in the Digest at the beginning of the *Cases*. For example, paragraph 32 of the *Guide* deals with the subject of destruction of identity. Paragraph 32 of the Digest of Cases sets out the names of all the cases on this subject and gives their reference numbers in the *Cases*.

The wise practitioner will hasten to purchase a copy of the new *Guide* and will use it with the *Cases*. He will also study his *Megarry* for further discussion of any difficult points.

The new *Guide*, like the third edition of the *Cases*, is the joint work of L. A. Blundell and V. G. Wellings, two names which spell authority and reliability where the law of landlord and tenant in general, and of Rent Restrictions in particular, is concerned.

J. M. W.

Kelly's Draftsman. Tenth edition. By W. J. WILLIAMS, B.A., Barrister-at-Law. London: Butterworth & Co. (Publishers) Ltd. lxxii, 726 and (index) 65 pp. (£2 12s. 6d.)

Just after the War, the eighth edition of *Kelly* was in so much demand that, though published in 1933, a second-hand copy, if obtainable at all, fetched well above its published price. Who Kelly was we do not know, but he certainly produced a most satisfactory precedent book which has travelled

to and fro between our office and home for many years. The editor has rightly made no drastic alterations either in arrangement or in the precedents themselves, nor has he allowed the size to get out of hand. Under the heading "Contracts," we would like to see a precedent for the sale of a plot of land with a contract to build a house, a very usual type of contract today. On p. 116, the stamp duty on a contract for sale of a small business is given as *ad valorem* on the amount payable for goodwill and fixtures, but in practice only a 6d. stamp is used—see a note on this subject in Vol. 17 of *The Conveyancer*, at p. 4. The conveyance by a survivor of joint tenants (p. 166) takes the form of an appointment of new trustee and conveyance by the surviving joint tenant and the new trustee in two instruments. We are sorry that the editor, who does not think a new trustee need be appointed, should give encouragement to this cumbersome method of conveyance. The heading "Notices" has, of necessity, seen some additions and is a very useful part of the book. The editor has rightly omitted those prescribed forms which are obtainable from law stationers. The heading "Registered Land," which until the last edition did not appear at all, is still on the short side. It is always easy to complain of omissions, and the editor is entitled to ask where space can be made. Indeed, it is difficult, but we suggest that today six precedents of marriage settlements are unnecessary and a little saving could be made under "Assents"—form 19 does not seem very useful. We could easily add a few of our own likes and dislikes, but they would hardly assist a prospective purchaser to know whether he should or should not buy the new edition. Our general impression, however, is that the editor has brought the book up to date and has continued to maintain the high standard set by previous editions; it can still claim to be a general, comprehensive precedent book covering all usual, and a few unusual, transactions that a practitioner is likely to come across in everyday practice.

E. F. G.

Landlord and Tenant in South Africa. Fifth edition. By GEORGE WILLE, LL.D., Q.C. Capetown: Juta & Co. Ltd. xxiii, 284 and (index) 20 pp. (English price £3 3s.)

At first blush the English practitioner might be envious of the South African who can find a fairly full statement of his law of landlord and tenant (including the Rent Acts) in 284 pages, but he might take a different view when he realised that precedent books in South Africa are almost non-existent and that, as so often happens in Roman-Dutch law, a good deal of the subject is uncharted by modern authority. The South African law of landlord and tenant is still substantially Roman-Dutch common law and the hand of the legislator does not yet lay heavily upon it. It is true that the Rent Acts continue to apply but they have never had that rigid pegging to out of date rents that is the hallmark of the English code. The Roman-Dutch common law is more favourable to the tenant than English common law and, perhaps for that reason, neither the courts nor the legislature have seen the need to give the tenant relief against forfeiture. The whole approach to the subject in the two countries is quite different: in South Africa the law in general draws no distinction between movable and immovable property, so that the same principles apply to leases of land and the letting and hiring of goods. We doubt whether either country is likely to get much assistance from the other. The South African lawyer suffers from a serious lack of textbooks in a way quite unknown to the English lawyer. Professor Wille is one of that small band which has tried to make good the defect and his book is essential for practitioners in South Africa, even if only because it is the only book in the field. The new

edition is quite up to date, but it does seem to us a pity that the book still gives the impression, no doubt true in 1910, the date of the first edition, of being pioneering instead of setting forth an authoritative and detailed statement of the subject, leaving those interested to turn to the earlier editions for discussions as to the history of the subject and the meaning of antiquated Placaats.

E. F. G.

We have also received:—

Change of Name. Fifth edition. By J. F. JOSLING, Solicitor. Oyez Practice Notes. The Solicitors' Law Stationery Society Ltd. 31 pp. (3s.)—These notes deal fully with the subject and contain a number of precedents.

Woodfall's Law of Landlord and Tenant. Second Supplement to Twenty-fifth Edition and Permanent Supplement. (To March 1, 1956.) By LIONEL A. BLUNDELL and V. G. WELLINGS. London: Sweet & Maxwell, Ltd. (6s. 6d.)

The authors and publishers of *Woodfall* are to be congratulated on their efficient arrangements for keeping the main work up to date, almost as important a matter now as the publication of the main work itself. This is the Second Supplement and brings the story up to March 1, 1956. It supersedes the First Supplement, which took it up to February 1, 1955. In other words, this new Supplement includes all the matter which was in the First Supplement plus the new matter. It is, of course, absolutely indispensable to all who possess the main work and the Permanent Supplement on the Landlord and Tenant Act, 1954, and the Housing Repairs and Rents Act, 1954. No relevant cases or statutory provisions appear to have escaped the eagle eyes of the editors. The arrangement and layout are simple and clear.

J. M. W.